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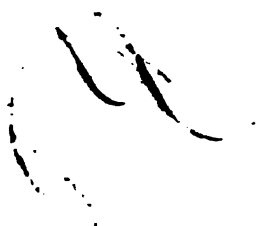


State reports - C

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R E P O R T S,
of
C A S E S

ADJUDGED IN THE
SUPERIOR COURT
AND IN THE
SUPREME COURT OF ERRORS,
IN THE
STATE OF CONNECTICUT,

From JUNE A. D. 1793, to JANUARY A. D. 1798 ;
BEING FOUR YEARS AND A HALF, OR, NINE CIRCUITS.

By JESSE ROOT,
A JUDGE OF THE SUPERIOR COURT.

VOL. II.

HARTFORD:
PRINTED BY HUDSON AND GOODWIN.
1802.


UNIVERSITY

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P R E F A C E.

THE author's inducement to continue these Reports, is to contribute what is in his power, to render stable, clear and consistent, the system of jurisprudence and the laws of the state, by publishing the adjudged cases in the highest courts of law in the state, for the term of years specified in said Reports ; although accompanied with much care and trouble without any pecuniary advantage to himself.



I N D E X.

A

Page.

	Page.	Jehu Brainard, Sheriff <i>vs</i> Wil-	
E LIJAH ABEL <i>vs</i> Byvanks,	174	ford, &c.	130
Adgate <i>vs</i> Storrs,	160	Brown, Executor, &c. <i>vs</i> Reed,	189
Allen <i>vs</i> Frisbie, &c.	76	Samuel Brown <i>vs</i> Dye,	280
Allen <i>vs</i> Lyon,	213	Jehu Brainard, Esq. <i>vs</i> William	
John H. Andrews <i>vs</i> Michael		Fowler, &c.	318
Lockwood,	239	A. Bradly <i>vs</i> T. Phelps,	325
Ainsworth <i>vs</i> Jareb Dyer,	202	N. Brown, &c. <i>vs</i> J. M. Breed,	523
Mary Alsop <i>vs</i> Michael Todd,	105	Bulkley, &c. <i>vs</i> Brainard, &c.	5
Mary Alsop <i>vs</i> Peck,	224	C. Bulkley <i>vs</i> Wright, &c.	10
Atwood <i>vs</i> Whittlesey,	37	C. Bulkley, &c. executors of	
Austin <i>vs</i> Hanchet,	148	O. Bulkley <i>vs</i> Clark,	60
B		C. Bulkley <i>vs</i> Wright, &c. ex-	
Bacon <i>vs</i> Curtis,	39	ecutors of Noah Bulkley,	70
Jabez Bacon <i>vs</i> Samuel Masters,	43	Samuel Bull <i>vs</i> Talcott, &c.	
Afa Bacon <i>vs</i> Goodfill,	283	committee,	119
Bacon <i>vs</i> Pettibone,	284	Burlingham <i>vs</i> Wylee, &c.	152
Baldwin <i>vs</i> Potter,	81	Ebenezer Bundy <i>vs</i> Peter Sabin,	54
Banks <i>vs</i> Mary Basset,	297	Burton <i>vs</i> Benjamin Butler,	214
Joshua Bailey <i>vs</i> E. Nichols,	407	Bush <i>vs</i> Byvanks,	248
Barber <i>vs</i> Andrus,	250	Jonathan Bull, Esq. &c. <i>vs</i> Na-	
Basset <i>vs</i> Gaius Davis,	204	thaniel Skinner, &c.	348
Barns <i>vs</i> Finch,	53	Bullock <i>vs</i> Hosford,	349
Barber <i>vs</i> Eno,	150	Jacob Bull <i>vs</i> Peter Pratt,	440
Bailey <i>vs</i> Tillinghurst,	97	Frederick Bull <i>vs</i> Simeon Royce,	451
Barber <i>vs</i> Robert Gordon,	95	Samuel Bull <i>vs</i> Caleb Bull,	476
T. Belden, &c. <i>vs</i> M. Silliman,	75	Z. Burnham <i>vs</i> W. Baker,	526
Beecher <i>vs</i> Sheriff Chester,	90	C	
Betts <i>vs</i> Hilliard,	131	Cargel, &c. committee of school	
Beebe <i>vs</i> Tinker,	160	society <i>vs</i> Seth Grosvenor	
Jonas Betton <i>vs</i> John Avery,	279	committee of first society in	
Beardsley <i>vs</i> Foot,	399	Pomfret,	458
Deodat Bement <i>vs</i> Miller, &c.	494	Wm. Carter <i>vs</i> Daniel Rosa, &c.	507
J. Benedict <i>vs</i> Sarah Roberts,	496	Cannon <i>vs</i> Hallet, &c.	29
James Bird <i>vs</i> Wm. Holabert,	35	John Calder, &c. <i>vs</i> Caleb Bull,	50
Judith Bill <i>vs</i> Lyme,	213	Candy <i>vs</i> Twitchel,	123
Thomas Bird <i>vs</i> Isaac Bird,	411	Candy <i>vs</i> Lambert,	173
Borden <i>vs</i> Kingsbury,	39	Cadwell <i>vs</i> Smith, &c.	187
Bowers <i>vs</i> Dunn,	59	Samuel Casey <i>vs</i> John Casey,	269
John Blackman <i>vs</i> Peter Nichols,	243	Canfield <i>vs</i> Squire,	300
Zalmon Booth <i>vs</i> U. Wallace,	247	Calkins <i>vs</i> John Munsel, &c.	333
Bostwick <i>vs</i> Bogardus,	250	J. Calder, &c. <i>vs</i> C. Bull, &c.	350
Bowne <i>vs</i> Olcott,	353	Calkins <i>vs</i> Lee,	363
Bolton <i>vs</i> Haddam,	517	Campbell <i>vs</i> Crandal,	371
Brooks <i>vs</i> Williams,	27	Timothy Castle <i>vs</i> John Pierce,	294
S. Bronfon <i>vs</i> E. Bronfon,	73	Chaffee, &c. <i>vs</i> Dodge, &c.	205
Brown <i>vs</i> Pierce,	95	N. Chancy <i>vs</i> A. Strong,	369

I N D E X.

	Page.		Page.
Chapman <i>vs</i> Brainard,	375	John Fields <i>vs</i> William Law,	320
Chittington <i>vs</i> Fowler,	5	Filer and wife <i>vs</i> Bissel,	347
E. Church <i>vs</i> R. Ruffel,	434	Abel Fitch <i>vs</i> J. Lothrop, &c.	524
Church <i>vs</i> Smith, &c.	138	Fowler <i>vs</i> Norton,	25
Church <i>vs</i> Flowers,	144	Fowler <i>vs</i> Collins,	231
Joshua Church <i>vs</i> Parmele, &c.	248	Fowler <i>vs</i> A. Norton,	231
Joshua Church <i>vs</i> Dewolf, &c.	282	D. Ford, appeal from probate,	232
Shelden Clark <i>vs</i> Higgins,	398	T. Fowler, &c. <i>vs</i> A. Macomb,	388
Clement <i>vs</i> Wheeler,	466	Samuel French <i>vs</i> Z. Lyon,	69
Clinton <i>vs</i> Hopkins,	25	French <i>vs</i> Potter,	359
Clinton <i>vs</i> Hopkins	225	Freeman <i>vs</i> Beadle,	492
James Clark <i>vs</i> Benj. Bull, &c.	329	Zachariah Fuller <i>vs</i> Reed,	188
Danford Clark <i>vs</i> John Ely,	380	Fuller <i>vs</i> Burrel,	296
Dema Clark, &c. appeal from probate,	383	G	
J. P. Cook, Esq. <i>vs</i> L. Osborn,	31	Gallup <i>vs</i> Fish,	452
Cook <i>vs</i> Preston,	78	Geer <i>vs</i> Huntington,	364
Colt, &c. <i>vs</i> Ashbel Cornwal,	109	Gilbert <i>vs</i> Samuel Lynes,	168
Joshiah Converse Administrator of Eleanor Converse <i>vs</i> Stephen Moulton,	193	B. Goodrich <i>vs</i> Richard Nichols,	498
William Coit, &c. <i>vs</i> Bishop,	222	John Goff <i>vs</i> Billingshurst,	527
Cockran <i>vs</i> Leister,	348	Granger <i>vs</i> Hancock,	88
David Cressley <i>vs</i> Elijah Phelps,	420	Grant <i>vs</i> Foster, &c.	479
Hopestill Crittington <i>vs</i> Hezekiah Brainard, &c.	485	Harmon Gray <i>vs</i> Will, &c.	257
Robert Crane, &c. heirs of Jesse Crane, appeal from probate,	487	Benj. Green, administrator of Nath'l Green <i>vs</i> Abbot, &c.	242
Crofs <i>vs</i> Guthrey,	90	Guernsey <i>vs</i> Morse,	252
Henry Crane, &c. <i>vs</i> David Brainard,	118	H	
Crocker <i>vs</i> Waldo,	251	Hallock <i>vs</i> Bush,	26
Joseph Culver <i>vs</i> Culver,	278	Halfey <i>vs</i> Fanning,	101
D		Hall <i>vs</i> Rowley,	161
John Daniels <i>vs</i> S. Alvord, &c.	196	Hampton <i>vs</i> Windham,	199
Daniels <i>vs</i> Wilcox,	346	Hamlin <i>vs</i> Mitchel,	297
Dee <i>vs</i> Ely,	11	Hart <i>vs</i> Brown,	301
R. Dekentland <i>vs</i> A. Somers,	437	Hayden, &c. <i>vs</i> Oliver Loomis,	350
R. Dickerson <i>vs</i> Whittlesey,	121	Heirs of John Hall <i>vs</i> Wm. Hall,	383
Doty <i>vs</i> Reed.	81	Dan'l Henshaw <i>vs</i> Clark,	4
Dorrance <i>vs</i> Shubael Simons,	208	Joseph Henshaw <i>vs</i> Atkins,	7
Doty <i>vs</i> George White,	426	Henshaw <i>vs</i> Clark, &c.	103
D. Doty <i>vs</i> T. Judson, &c.	427	Gurdon Hewitt <i>vs</i> S. Morgan,	363
Jareb Dyer <i>vs</i> John Girard,	55	Gideon Hills <i>vs</i> W. Hobert,	48
E		Hilliard <i>vs</i> Nichols,	31 176
Edwards <i>vs</i> Baldwin,	23	Hills <i>vs</i> W. Hobert,	137
D. Elmore <i>vs</i> J. Austin,	415	Hobert <i>vs</i> Norton,	46
F		Holdridge <i>vs</i> Pel'p Allen,	139
Fairweather <i>vs</i> Curtiss,	32	E. Holcomb &c. <i>vs</i> N. Gillet,	478
R. Fairbanks, &c. appeal from probate,	386	Hofmer <i>vs</i> Barret, Adm'r of Oliver Barret,	156
		R. Huntley <i>vs</i> John Comstock,	99
		Hurlbut <i>vs</i> James Rogers,	60
		Hurd and Stanley <i>vs</i> State,	186
		Hun <i>vs</i> Higby,	190
		Hull <i>vs</i> Minor,	223

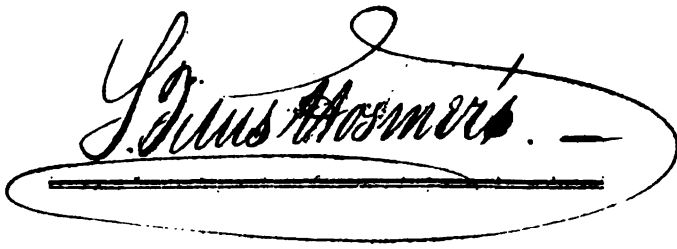


I N D E X.

	<i>Page.</i>		<i>Page.</i>
Ashbel Humphry <i>vs</i> Virgilius P. Bogue,	437	Geo. Minor <i>vs</i> Woodbridge, &c.	274
I		Miller, &c. <i>vs</i> Hall, &c.	399
Johnson <i>vs</i> Gunn,	130	Phineas Miller, &c. <i>vs</i> Lynde,	444
Johnson <i>vs</i> Morfe,	252	Jona. Miller <i>vs</i> Gordon Whitmore,	488
Christ. Johnson <i>vs</i> Jesse Smith,	414	Mitchelson <i>vs</i> Enos,	515
Benjamin Judd, &c. committee <i>vs</i> Woodruff,	298	John H. Miller <i>vs</i> Jacob Riley,	522
Ives <i>vs</i> Beach,	125	Nath. Morgan <i>vs</i> Nath. Minor,	220
John Ives <i>vs</i> Josiah Curtifs,	130	Perez Mun, &c. <i>vs</i> Carrington,	15
K		Munson <i>vs</i> Hills,	324
Kelly <i>vs</i> Riggs,	13	N	
Kelly <i>vs</i> Riggs,	126	Thomas Neil <i>vs</i> Miller,	117
King <i>vs</i> Brockway,	86	Ab'm Nelson <i>vs</i> Jed. Hubbel executor of H. Winegar,	421
Eb. Kingsbury <i>vs</i> Town of Tolland,	355	Newton <i>vs</i> Paddock,	89
And. Kingsbury, Esq. <i>vs</i> John Phipps,	357	Nettleton <i>vs</i> Redfield,	119
Daniel Knowles <i>vs</i> State,	282	New-London <i>vs</i> Emerson,	372
L		Tho's. Newson <i>vs</i> Lem. Storrs,	441
Langdon <i>vs</i> Chittington,	133	Wm. Nichols <i>vs</i> Tho's Giles,	461
Lambert <i>vs</i> Parmele,	181	O	
Wm. Laight <i>vs</i> I. Tomlinson,	233	Olmsted, &c. <i>vs</i> David Doty,	184
Lay <i>vs</i> Hayden, &c.	317	Jos. Otis <i>vs</i> Hez'h Abel, jun.	521
Law <i>vs</i> Atwater,	72	P	
R. Law, Esq. <i>vs</i> Wilfon,	102	Paddock <i>vs</i> Higgins, Esq.	316
Wm. Law <i>vs</i> Hannah Hall,	171	Paddock <i>vs</i> Higgins, Esq.	482
Elij. Lawrence <i>vs</i> Elij. Phelps,	334	Painter <i>vs</i> Elifha Smith, Executor of Daniel Grant,	142
Polly Leister <i>vs</i> Sally Smith,	24	M. Parsons <i>vs</i> S. T. Hofmer,	1
Thomas Lee <i>vs</i> Elifha Abbe,	359	Park <i>vs</i> Halfey,	100
Lewis <i>vs</i> Litchfield,	436	Lem'l Parish <i>vs</i> Peter Stanton,	154
John Livingston <i>vs</i> Abel,	57	Parkhurst <i>vs</i> Powers,	531
Litchfield <i>vs</i> Wilmot,	288	Amos Payne,	156
Livingston, &c. <i>vs</i> Isaac Bird,	438	Parmele <i>vs</i> Guthrey,	185
Lillie <i>vs</i> Jacob Wilfon,	517	Parker <i>vs</i> Smedley,	286
Leavit <i>vs</i> Johnson,	114	Parmele, &c. <i>vs</i> Lambert,	430
Sheriff Lord <i>vs</i> Atwood,	336	R. Paul <i>vs</i> county of Tolland,	196
Sheriff Lord <i>vs</i> Benton, &c.	335	Pettibone <i>vs</i> Phelps, &c.	137
Mich'l Lockwood, adm'r of Jabez Lockwood <i>vs</i> G. Lockwood,	409	Pettet <i>vs</i> W. Seaman,	178
Daniel Loomis <i>vs</i> Elij. Loomis,	454	Pettibone <i>vs</i> Gozzard,	254
Lyon <i>vs</i> County of Fairfield,	30	Pettibone, adm'r of Lem'l Roberts <i>vs</i> James Roberts,	258
Wm. Lyon <i>vs</i> Benj. Lyon,	203	Perkins <i>vs</i> Burnet,	30
M		J. Perkins <i>vs</i> J. Williams,	462
David Manwaring <i>vs</i> Harris,	456	Pitkin <i>vs</i> Flowers,	42
Oliv. Mather <i>vs</i> James Phelps,	150	Pinney <i>vs</i> Pinney,	191
Merriman <i>vs</i> Bifell,	1378	John Pitts <i>vs</i> John Clark,	221
Stephen Miller <i>vs</i> Matthew Talcott, Esq. &c.	115	T. Phelps <i>vs</i> J. R. Livingston, &c.	495
Mills <i>vs</i> St. John,	188	E. W. Phelps <i>vs</i> Asa Blood,	518
Penelopen Miller <i>vs</i> Grosvenor,	208	Daniel Porter <i>vs</i> Warner,	22
		E. Pond <i>vs</i> Peter Pond,	41
		W. Potter <i>vs</i> T. Allen, &c.	63

I N D E X.

	<i>Page.</i>		<i>Page.</i>
Pomroy <i>vs</i> Kibbe,	92	Snow <i>vs</i> Chapman,	99
Israel Porter <i>vs</i> Seabor, &c.	146	Spencer, Esq. <i>vs</i> S. Church, &c.	80
Mary Porter <i>vs</i> J. Bacon,	417	L. Spalding <i>vs</i> E. Spalding,	271
Pruden <i>vs</i> W. Leavenworth, &c.	129	Spegail <i>vs</i> Perkins,	274
Plumb <i>vs</i> Mary Alfop,	224	Stanly <i>vs</i> Duburft,	52
R		State <i>vs</i> Daniel Wilfon,	62
Raymond <i>vs</i> Barker,	370	Starr <i>vs</i> Goodwin,	71
Ranny, &c. <i>vs</i> J. Church,	420	Stevens <i>vs</i> Payne,	83
Reynolds, &c. <i>vs</i> Stevens,	136	State <i>vs</i> Benjamin Lockier,	84
Riggs <i>vs</i> Woodruff,	35	State <i>vs</i> Isaac Phelps,	87
S. Richardson <i>vs</i> Z. T. Richard-		State <i>vs</i> Ford,	93
son,	159 219	Strong <i>vs</i> Peters,	93
J. Richardson <i>vs</i> Frink, &c.	270	J. Stoddard &c. <i>vs</i> J. Gates,	157
James Rogers <i>vs</i> Moore,	58	J. Stanly <i>vs</i> J. Ogden,	259.
Sol. Rogers <i>vs</i> Moore, &c.	159	G. Starr <i>vs</i> E. Starr, &c. execu-	
Davis Ross <i>vs</i> John Bates,	198	tors of P. Mortimer,	303
G. Roberts <i>vs</i> State Treasur,	381	Christ. Starr <i>vs</i> Tracy, &c.	528
Ruffel <i>vs</i> Tuttle,	22	State <i>vs</i> O'Brien,	516
Ruffel <i>vs</i> Cornwell,	68	State <i>vs</i> Richard Doan,	451
Ruffel <i>vs</i> Cornwell,	122	Christopher Surdam <i>vs</i> Reed,	429
Ruffel <i>vs</i> Case,	211	T	
S		T. Taylor, &c. <i>vs</i> E. Talman,	291
Sage, &c. committee <i>vs</i> White,	111	William Taylor <i>vs</i> Ezra Starr,	293
Savage <i>vs</i> White,	377	N. Talcott, jr. <i>vs</i> S. Pulifer, &c.	443
Salisbury <i>vs</i> Harwinton,	435	John Thomas <i>vs</i> Mary Alfop,	12
S. Sanford <i>vs</i> Walhburn, &c.	499	Thatcher <i>vs</i> Prentice,	20
Scovel <i>vs</i> Tyler,	144.	E. Thomas <i>vs</i> R. Dorchester,	124
N. Scovel <i>vs</i> Chapman, &c.	315	Thatcher <i>vs</i> Dudley, &c.	169
Seymour <i>vs</i> Mitchel,	145	Tomlinfon <i>vs</i> Booth,	32
N. Seely <i>vs</i> Executors of Staples,	74	R. Townsend <i>vs</i> G. Phillips, &c.	400
Sedgwick, &c. <i>vs</i> John Pierce,	431	Tomkins <i>vs</i> Beers,	498
Sedgwick <i>vs</i> David Waterman,	434	E. Tyler <i>vs</i> Atwater, &c.	72
Shelton <i>vs</i> Tomlinfon,	132	Tyler <i>vs</i> Tyler,	519
D. Sherman, Esq. <i>vs</i> E. Talman,	140	W	
Heirs of Daniel Sheldon <i>vs</i> Heirs		Jacob Watfon <i>vs</i> Hart, &c.	59
of Isaac Shldon,	254	Warren <i>vs</i> Rogers,	156
David Shelton <i>vs</i> Enos Dutton,	444	Sarah Waters <i>vs</i> Selectmen of	
D. Sheldon, &c. <i>vs</i> J. Wood-		Bozrah,	214
bridge,	473	J. Warner <i>vs</i> A. Willy,	490
D. Sheldon <i>vs</i> Seth Bird, &c.	509	Eli Wells <i>vs</i> Deming,	149
Anne Sheldon, &c. <i>vs</i> Daniel		John Wells <i>vs</i> Lindly,	481
Sheldon, &c.	512	Welch <i>vs</i> Gould,	287
Mary Sidleman <i>vs</i> Boardman,	215	Wetmore <i>vs</i> Smith,	6
James Simons <i>vs</i> S. Payne, &c.	406	E. Wheeler <i>vs</i> I. Gorham,	328
Frances Siftare <i>vs</i> J. Siftare,	488	J. Wetmore <i>vs</i> D. Lyman,	484
Shipman <i>vs</i> Miller,	405	Wilford <i>vs</i> Rose,	20 172
P. Smith <i>vs</i> S. Smith,	42	E. Williams, Esq. <i>vs</i> County of	
S. Smith <i>vs</i> Holbrook, &c.	45	New-Haven,	23
Smith <i>vs</i> Pitkin,	46	N. Williams <i>vs</i> L. Brooks,	34
S. Smith <i>vs</i> Crocker,	84	J. Willet <i>vs</i> Hutchinson,	85
Dorothy Smith <i>vs</i> Ward,	302 374	J. Willet <i>vs</i> Overton, &c.	328



REPORTS OF CASES,

IN JULY CIRCUIT, A. D. 1793, AND JANUARY
A. D. 1794.



County of Middlesex, July Term, A. D. 1793.

HON. ANDREW ADAMS, Esq. CHIEF JUDGE.
JESSE ROOT, Esq.
JONATHAN STURGES, Esq. } JUDGES.
BENJAMIN HUNTINGTON, Esq.
ASHER MILLER, Esq.

Mehitable Parsons *vers.* S. Titus Hofmer, Administrator on the Estate of Gen. Samuel Holden Parsons.

PETITION in chancery ; shewing that in A. D. 1787, said General Parsons was appointed Judge of the Supreme Court in the Western Territory of the United States ; and being about to leave his family at Middletown, consisting of his wife the petitioner, and a number of young children, and being indebted to the full amount of all his property, did, in order to make provision for the support of the petitioner and his children, in case he should not re-

A mistake in drawing a life policy relieved against in chancery.

COUNTY OF MIDDLESEX,

turn, apply to George Phillips, &c. Insurance Company at Middletown and agreed with them for a policy of insurance upon his life, for the term of four years from the 1st day of March A. D. 1788, valued at £200 lawful money, for the premium of four per cent per annum, to be paid to the said Mehitable for her use and benefit ; and having thus agreed with the underwriters for said policy, with instructions that it should be filled up, as aforesaid ; and paid the premium for the first year ; he went away in haste before said policy was filled up ; and after he was gone said underwriters filled up said policy, and by mistake, made the sum insured, payable to the said General Parsons, his Executors and Administrators, instead of making it payable to the said Mehitable, contrary to the agreement and instructions of said General Parsons ; that she is able to prove this by George Phillips, Elijah Hubbard, &c. further shewing that said underwriters having filled up said policy as aforesaid and delivered it to her, that she received and held it without attending to the form in which it was filled up, until after the death of said General Parsons, which happened in the fall of the year A. D. 1789, when she found to her great surprize and disappointment, the policy was made payable to said General Parsons, his executors and administrators, and that S. Titus Hofmer, Esq. administrator of said General Parsons had taken said policy from the petitioner and received the money due thereon from the underwriters, for the benefit of his creditors ; whereby the petitioner was deprived by mistake and accident in filling up said policy, of the only means of support left her by her said husband ; further alledging that the premium for said second year was not paid by said Parsons nor out of his estate, and praying to be relieved against said mistake ; and that the administrator of said General Parsons be ordered, to pay said money received of said underwriters over to her for her use and benefit.

To this petition, the respondent plead in abatement, 1st, That said underwriters were not cited, nor made parties to the petition—2d, That the petition and

matters therein contained, were insufficient to entitle the petitioner to any relief ; for that parol evidence was not admissible to contradict the writing.

Judgment—That the 1st exception in abatement is insufficient, and as to the 2d, that the petition is sufficient.—By the court,

The question in this case, is not what the policy is, nor what is the meaning and construction of it ; but what it ought to have been, and whether by any mistake or fraud it is otherwise, than by the parties' agreement and instructions it should have been ; to this point parole evidence is admissible and doth not contravene any principle of statute or common law—and indeed it becomes absolutely necessary, in certain cases, for the promotion of justice ; otherwise a party might be injured and ruined, by an innocent mistake, or by fraud, and be forever remediless.

This principle is settled by the courts of chancery in Great Britain ; and was fully recognized and adjudged by the general assembly, sitting in chancery, in May A. D. 1771, on the petition of Jedediah Chapel, *vs.* the heirs of Joseph Rogers ; shewing that on the 26th January A. D. 1761, said Joseph to secure a debt which he owed to Christopher Raymond, agreed to give him a mortgage deed of a piece of land containing 46 acres, lying within certain bounds which were set out in the petition ; that the scrivener who drew said deed, by mistake, described the bounds in such manner as not to include the land meant to have been included in said deed, but other lands which did not belong to said Joseph, and that said deed was executed without observing the mistake ; further, that said Raymond for a valuable consideration, assigned said mortgage to the petitioner without notice of said mistake ; that said Joseph Rogers had since deceased, and his heirs having discovered the mistake in said deed, had brought forward their action at law and evicted the petitioner of said lands, alledging that he was able to prove said mistake in the drawing of said deed, and that the land recovered from him by said heirs, was

COUNTY OF MIDDLESEX,

the land said Joseph Rogers agreed and gave directions to have included in said mortgage; praying for relief.

The assembly sustained the petition, and referred it to a committee, who reported the facts to be, as set up in the petition—the report was accepted, and thereupon the assembly made a special order and decree rectifying the mistake in said deed, disannulling the judgment recovered by said heirs, and confirming the title in the petitioner as a mortgaged estate defeasible upon said heirs paying the mortgage money in a limited time. Vide Mitford's 117. 3 Levins 36, and 1 Vern. 443 and 446—and 2, Atkins. Langly *vs.* Brown, page 203.

6th Decr. 1761

The petition of Mehitable Parsons was afterwards heard upon the merits and granted—and the money received by said administrator of said underwriters, was ordered to be paid to the petitioner agreeable to the original instructions given for filling up said policy.

Daniel Henshaw *vers.* Clark, &c.

ACTION of account, that to the plaintiff the defendants render their reasonable account for the time they were bailiffs of the plaintiff; and receivers of the monies of the plaintiff: viz. from October A. D. 1790, to October A. D. 1792, ~~for~~ that the plaintiff declares and says, that in October A. D. 1790, the plaintiff and defendants were joint owners of the brigantine Betsey in the following proportion (viz.) the plaintiff five eighths, and the defendants three eighths; and that the defendants have had the possession, use and improvement of said brigantine ever since said October A. D. 1790, and have employed her in sundry profitable voyages and have taken and received the whole avails of said voyages and of the earnings of said brigantine to themselves, and have ever refused to account for the same, &c.

The defendants plead that they were never bailiffs and receivers of the monies of the plaintiff in man-

ner and form as the plaintiff in his declaration had alledged and put themselves on the country, and the issue was closed to the jury; and the jury found that the defendants, never were bailiffs and receivers of the monies of the plaintiff in manner and form as the plaintiff in his declaration had alledged.

The plaintiff moved in arrest of judgment, that the issue was immaterial, that neither the plea nor the verdict was an answer to the plaintiff's declaration.

Judgment—That the motion in arrest was sufficient and a replender ordered.

The defendants are charged as bailiffs of the plaintiff generally, and as receivers of the monies of the plaintiff, for that they had the use and improvement of said brigantine and received the avails of sundry profitable voyages, &c. to account. The plea goes only to their being bailiffs and receivers of the monies of the plaintiff which leaves the other parts of the declaration, viz. the avails of the voyages unanswered, and the words, manner and form, doth not help it.

Verdict arrested for the immateriality of the issue.

Bulkley, &c. *vers.* Brainard & Childs.

ACTION upon a written contract dated the 5th of February A. D. 1789, whereby the defendants sold to the plaintiffs a certain vessel upon the stocks and agreed to compleat the carpenter's work by the first of May then next at the price of 50s per ton; to be paid in West India goods, and what iron the defendants had furnished for the vessel, the plaintiffs agreed to pay for in cash by the first of May then next, and for working said iron they were to pay in West India goods the same as for the carpenters' work, at 18s per hundred, and what further iron should be wanted for the vessel the plaintiffs agreed to furnish. The breach assigned was that the defendants did not compleat said vessel by the first of said May agreeable to said contract, nor until the 12th of said May; and further that she was not well built, was leaky and her decks bad, &c.

If the defendants are to build a vessel by a certain time & the plaintiffs to find the iron, if the iron is not provided in time, the defendants are excused for not compleating it by the time.

Plea—Not guilty, issue to the Jury.

The defendants offered evidence to prove that the iron provided at the time of the contract, was not sufficient to finish said vessel, and that the plaintiffs neglected to furnish the iron which was necessary, before the first of May aforesaid, and for that reason they left off working upon her, with the knowledge and consent of the plaintiffs.

The plaintiffs objected against this evidence as being improper on this issue, and by the court the evidence is admissible, as it goes directly to the point of shewing that the defendants are justly excused from any mis or non feazance in not performing their contract by the time; for it is a condition precedent by the contract that the plaintiffs should furnish the iron, which they did not. A verdict was found for the defendants and accepted by the court, and the plaintiffs filed a bill of exceptions, and the judgment was affirmed in the supreme court of errors. #

Wetmore *vers.* Smith.

WRIT of error to reverse a judgment of a justice in an action of book debt brought by Smith *vs.* Wetmore, per writ dated the 9th of May A. D. 1792, and served the 12th of said May.

The defendant plead in bar, that having prayed oyer of the plaintiffs book and the same being read to him, it consisted of the following charges and dates, (*viz.*) Recites them. All of which were delivered and charged more than six years before the first of May A. D. 1792; and by the statute of limitation the plaintiff was debarred of any recovery therefor.

The plaintiff replied that on the 26th of April, said Wetmore sued him in an action on book to be answered before a justice on the 3d day of May then next; in which by law, he might have recovered the balance due to him; and so his said book was sued for, before said first of May. Demurrer to the reply. Judgment—That the plaintiff's reply was sufficient.

It will be observed that determination was very erroneous. It was not of the issue. By the 1st. has found, that the def. having the to furnish iron, it would have been different. The action was anterior to the contract,

Error assigned—That the justice ought to have adjudged said reply insufficient.

Judgment—Manifest error.

The statute is, that all such book debts as are now outstanding, or that shall hereafter be contracted and shall not within six years after the contracting the same, or within that term of time after the first day of July A. D. 1785, where such debts are already contracted, be either sued for, balanced or accounted for with the original debtor, his attorney, &c. shall not be recoverable in any court in this state. This statute was made at the general assembly holden in October A. D. 1784, and attached upon this book debt on the first of May A. D. 1792—unless saved out of the statute by being sued for, or balanced, &c.

By the court, a debt being sued for, so as to save it out of the statute, must be a suit commenced and prosecuted to judgment—but it doth not appear what became of the suit which was instituted by the plaintiff in April 1792; besides Wetmore's action was no bar to Smith's suing Wetmore on book, to recover the balance due to him. Vide I Vol. Root's Reports, 155, Ratcliff *vs.* Dewitt.

Joshua Henshaw *vs.* Atkins.

WRIT of error to reverse a decree in chancery of the county court, on a petition brought by said Atkins against said Henshaw—Shewing that in April A. D. 1792, the said Henshaw being an attorney at law, had in his possession the books of accounts of Elijah Blackman, late of Middletown, then of Blandford in the state of Massachusetts; that on the 23d of April aforesaid, said Henshaw applied to the petitioner and informed him that he had said books put into his hands by said Blackman, as an attorney to collect for him; that there was a balance due on said books from Ebenezer Atkins deceased, the father of the petitioner, of £7-18-0 and also a balance due from the petitioner, of £1-7-0 lawful money, which were sworn to by said Blackman, and called on him

Chancery will relieve against notes and executions obtained by fraud, by granting a perpetual injunction.

*was the specific act, a rather unusual one, if the
p. & therefore should have been pleaded*

for the pay of both accounts—that the petitioner objected against paying the balance due from his father, as he was neither executor nor administrator to him, and not liable; that the said Henshaw declared to him that he was liable for said balance, and that he could recover it of him in the law; and he might compel his brothers to make contribution, although he was not executor or administrator; further urging the necessity of immediate payment, that said Blackman was hard pressed for a debt, and wanted the money to discharge it. This being on Saturday of the week next before the last day of serving writs for the county court in that county; and said Henshaw told him, that the debt was due and recoverable at law, and unless he settled it, he should put it in suit to the next court, which would make ten or fifteen dollars cost which he should put into his own pocket; he then informed said Henshaw that he had not got the money to pay it; Henshaw then told him, that, although his orders were to take nothing but the money, yet to oblige him he would take his notes for said balances; and strenuously advised him as a friend to give his notes, that it would be the best thing he could do—that the petitioner being an ignorant man, wholly unacquainted with the law, or the proceedings in court, and not having any opportunity to see said balances in said books, as said Henshaw declined shewing them to him; but said Henshaw affirmed that said balances were due on said books and that they were recoverable of him in the law, and the petitioner placing entire confidence in said Henshaw, both as to the truth of his affirmations and his judgment of law, and believing that he had no interest in them; but was acting only as attorney to said Blackman, complied and gave two notes, one for £7-18-0, and one note for £1-7-0 lawful money—That said Henshaw had since sued said large note and recovered judgment against him by default, before a justice at New-Hartford, for £8-0-0 debt, and the cost, and had taken out execution and was pressing him for the money; further alleging that he had paid £3-2-7 towards said large note which had not been applied, and the petitioner

JULY TERM, A. D. 1793.

further alledged that he had since applied to said Blackman, and found by him, that whatever balances were due on said books from the petitioner or his said father, were assigned to said Henshaw, and at the time of giving said notes were his property; and that the balances on said books due from the petitioner and his said father, did not amount to more than thirty-five shillings, if any thing was due; praying to be relieved against said execution and said small note, and that the sum of £3-2-7 paid as aforesaid and not applied, be refunded to him.

Plea in abatement—1st, That the petitioner had adequate remedy at law—2d, That the petition did not contain sufficient matter to entitle the petitioner to relief in Chancery—3d, That by the petitioners own shewing, the sum of thirty-five shillings was due on said books.

The county court judged the plea in abatement to be insufficient—and on a hearing of the petition on the merits, they found the facts alledged in said petition to be true, and passed a decree laying a perpetual injunction upon said Henshaw, his heirs &c. not to pursue or collect said execution, nor to prosecute said small note or collect the same—and that said Henshaw pay to the petitioner said sum of £3-2-7 lawful money, and the cost of this petition, taxed at £3-15-0 and that execution issue for both of said sums.

Errors assigned—Are 1st, that said petition doth not contain sufficient grounds for relief in chancery—2d, That the decree to pay said £3-2-7 is by the petitioners own shewing inequitable, thirty-five shillings being confessedly due on the books.

Upon a full hearing this court are of opinion that there is nothing erroneous in the judgment complained of.

By the court, the balances in Blackman's books were in the private knowledge of said Henshaw; and the petitioner had no means in his power to get sight of them, without the consent of said Henshaw, other-

wife than by suffering himself to be sued and praying over of them—further, said Henshaw was an attorney at law, an officer of confidence, and at that time not known to have any interest in the debts; the petitioner ought not to be chargeable with any laches or to suffer for placing confidence in him; by the facts alledged in the petition and found to be true by the court, said Henshaw was guilty of great duplicity in affirming that which was false, and by giving an opinion of the law which was wrong, and all this under the disguise of friendship and as being the attorney only to said Blackman, when in fact he was himself the party interested.

Chauncy Bulkly *vers.* Wright, &c. Executors of Noah Bulkly.

In case of joint obligations, the remedy at law survives against the survivor & his executors, &c.

ACTION of the case, declaring that in March A. D. 1775, Oliver Bulkley, late deceased, said Noah Bulkley and the plaintiff were merchants in company, and as such were indebted to Perry Hays and Sherbrook, and to Ludlow and Shaw, to a considerable amount, and entered into articles of agreement to dissolve said copartnership and that the plaintiff should pay all the debts of said company, and if they exceeded three hundred and fifty pounds lawful money, said Oliver and Noah agreed and covenanted to pay the plaintiff two thirds of the excess, and the plaintiff agreed to pay the other third, as by said written agreement ready in court to be shewn, appears—the plaintiff then set forth the debts of said company, which surmount the said sum of £350, the sum of £556-10-0 lawful money, one third of which is £185-10-0 which he has paid for said Noah and for which an action has accrued to the plaintiff to recover of the defendants in their capacity aforesaid by force of said agreement; of all which the defendants have had notice, and which had never been paid to his damage £185-10-0.

Plea in abatement—That by the plaintiff's own declaration it appears, that the agreement declared on, is a joint agreement between said Oliver and said Noah and the defendants say that said Noah died in A. D. 1776, that said Oliver survived said Noah and died in A. D. 1778 and left a plentiful estate; and that the plaintiff and one Joseph Bulkley are his executors; and that the remedy at law upon said agreement survived against said Oliver only, and his executors. To this plea the plaintiff demurred, and Judgment that the plea is sufficient. For by the declaration, the agreement entered into by Oliver and Noah to pay the plaintiff two thirds of what the company debts exceeded £350, appears to be a joint agreement between them, and the remedy in such case survives against Oliver the surviving co-obligor and his executors. Vide I Vol. Root's Reports 543, *Bundy vs. Williams*, executor of John Williams.

Dee vers. Ely.

W RIT of error to reverse a judgment of the county court in an action brought by Ely *vs.* Dee, before a justice and appealed to the county court declaring that on the 15th of July A. D. 1785, the defendant in consideration of £4-15-6 part of a civil list order lent to the defendant, at his special instance and request, to pay Aaron Steavens, the defendant assumed and promised to pay the plaintiff said £4-15-6 in lawful money, which was worth £4, when requested; and that he had not paid the same; damage £4-0-0; demurrer to the declaration and judgment for the plaintiff to recover; the defendant appealed to the county court, on the 30th of December, the day on which the judgment was rendered; but did not pay the duty until the 6th of January after; then he payed the duty and had it certified on the copies.

The state duty on appeals must be paid at the time of granting them.

The plaintiff plead in abatement of the appeal, that the state duty was not paid to the Justice by the defendant at the time of taking said appeal, the defend-

ant replied that the duty was offered to the justice at the time of taking the appeal but the justice replied, that it would be as well to pay it afterwards, and on the 6th of January next after, he paid said duty and the same is certified on the copies ; and thereupon he says said duty was paid to said justice as the law requires.

*Issue of Law
put to the
Jury. Alen!!*

The plaintiff rejoined, that said state duty was not paid to the justice at the time of taking of said appeal as the law requires. Issue to the jury—And the jury found that said state duty was not paid to said justice at the time of taking said appeal as the law requires, &c.

A motion in arrest was made that said plea in abatement was insufficient, and that the issue found by the jury was immaterial, the court judged said motion to be insufficient, and that said appeal abate.

Error assigned—That the county court ought to have judged said motion in arrest sufficient.

This court are of opinion that there is nothing erroneous in the judgment complained of.

The law requires that the state duty should be paid at the time of taking the appeal, and all appeals are to be taken in civil actions, during the sitting of the court, or the appeal must abate. Vide Root's Reports, I Vol. 475.

John Thomas *vers.* Mary Alfop, Administratrix to Richard Alfop.

WRIT of error to reverse a judgment of the county court in an action of debt on book brought by said Mary against said Thomas ; in which auditors were appointed, and who made return, that having heard said parties and liquidated their accounts, do award that the defendant pay to the plaintiff £4 and her cost. To this return a remonstrance was made, that said auditors had not found that the defendant owed said deceased or the plaintiff, but had arbitrarily awarded him to pay £4 to the plaintiff,

which no court had right to do, without finding the grounds on which such order was predicated—the remonstrance was judged insufficient and the return of the auditors accepted.

Error assigned—That said county court ought not to have accepted said return.

Judgment of this court—That there is manifest error in the judgment complained of.—The question between the parties in all actions of debt on book first to be determined by the auditors, is, doth the defendant owe the plaintiff, if he does, the next question is how much, and they must find that the defendant does owe the plaintiff in terms, or in words which import the same, as the foundation on which they award him to pay any sum whatever to the plaintiff.

Auditors in book debt must find that the defendant owes, or their return is bad if they award him to pay any thing.

New-Haven County, July Term, A. D. 1793.

Kelly vers. Riggs.

WRIT of error to reverse a judgment of a justice in an action of defamation brought by Riggs against Kelly, for the following defamatory words, viz. Capt. Riggs is a damn'd liar and rogue, and I can prove it—Damage £1-19-0.

The court must answer the issue joined by the parties.

The defendant demurred to the declaration, and the justice gave judgment as follows: It is the opinion of this court that the defendant pay to the plaintiff the sum of one pound lawful money damages, and his cost.

Errors assigned—1st, That the declaration was insufficient. 2d, That the justice by his judgment had not determined the issue.

Judgment of this court—That there is manifest error in the judgment complained of, for the last ex-

ception assigned in error, for the court must decide the issue joined and put to it, whether it be of law or of fact; and in this case the question was whether the declaration was sufficient in the law, or insufficient, and this the justice has not decided. Vide, Root's Reports I Vol. 200. Smith *vs.* Bellamy, and Gates *vs.* Nobles 344. As to the other point assigned for error, the court made no decision.

Wilford *vers.* Rose.

In an action on the covenants of seisin, the plaintiff must shew not only that the defendant was not seized, but who was.

ACTION for the breach of covenants in a certain deed, given by the defendant to the plaintiff, which was as follows, (*viz.*) for the consideration of £100 lawful money, I have given, granted, bargained, sold and released, and by these presents do give, grant, bargain, sell, alien, release, convey and confirm to him said Wilford, his heirs, &c. one whole share or right of land in the township of Wildersburgh in the State of Vermont, which was granted to Moses How an original proprietor, by his name being inserted in the charter, &c. to have and to hold the said granted premises to him, &c. and I do hereby engage to warrant and defend the said granted premises against all claims and demands of any person or persons claiming from, by or under me, or the original proprietor, as by said deed dated the 31st of December A. D. 1788. The breach assigned was that on said 31st of December A. D. 1788, when said deed was executed, the defendant was not the owner and proprietor of said right mentioned in said deed, nor had he at any time been the proprietor of the same, but long before said 31st of December said right of land had been sold for taxes due thereon, and was then forfeited for the non-payment of said taxes, nor could the same have been redeemed at the time of said sale to the plaintiff; whereby he had wholly lost said right of land; to his damage £200.

To this declaration the defendant gave a general demurrer, and the judgment of the court was—That the declaration was insufficient.

By the court—The deed is of one whole share or right of land in Wildersburgh which was granted to Moses How, an original proprietor. The terms in the deed, give, grant, bargain and sell, include in them a covenant on the part of the grantor, that he is seized and has right to sell and convey; the deed also contains a covenant of warranty against the grantor and all persons claiming and holding under him—also against the original proprietor and all persons claiming from or under him. The breach assigned is, that the defendant was not the owner and proprietor of said right at the time of executing said deed, nor had he ever been; but that long before said deed was given, said right of land had been sold for taxes, was then forfeited and irredeemable; but there is no allegation, in whom the right was at the date of said deed; or in whom it is now, and in an action on the covenants of seisin in a deed, it is necessary not only to aver that the covenantor was not seized, but, to shew who was seized; for in order to prove that the defendant was not seized, the plaintiff must prove that another person was. There is no breach alledged in the covenants of warranty in the deed, for there is no allegation that the plaintiff had been evicted of said right of land by any person claiming under the defendant, or under Moses How, the original proprietor.

Indy Lane

Perez Mun and wife Frances *vers.* Carrington.

ACTION of ejectment for two pieces of land lying in the town of Milford, claimed by the plaintiffs in right of the wife; of which she became seized in February A. D. 1792, and was disseized by the defendant on the 1st of May after.

The defendant plead that he had done the plaintiffs no wrong or disseisin. Issue to the jury—The jury found the following special verdict—

That on the 14th of March A. D. 1791, Frances Treat, now Frances Mun, wife of said Perez and one of the plaintiffs, then being a *feme sole*, caused the

Lands holden for 999 years are to be appraised off upon execution as fee simple lands are, an execution obtained by a *feme sole* may be levied on land after coverture and she may appoint an appraiser.

demanded premises to be attached for a debt due to her, in state notes, demanding £304-3-5 lawful money, and before the superior court holden at New-Haven in January A. D. 1792, she recovered a judgment against said Carrington for £139-8-9 lawful money debt, and £5-17-7 cost; for which sums she had execution dated the 14th of January A. D. 1792, returnable in sixty days; and delivered it to Peter Woodward a deputy sheriff, to levy, execute and return; that after delivering said execution to said officer and previous to its being levied, viz. on the 13th of February A. D. 1792; she intermarried with said Perez Mun, her present husband and one of the plaintiffs—that said Woodward after having made demand of money, goods, &c. to satisfy said execution, by the direction of the said Frances the creditor in said execution, levied the same on the demanded premises; and on the 13th of February, the said Frances appointed Abraham Tomlinson an indifferent freeholder of the town of Milford, to be an appraiser; and said Carrington refusing to appoint an appraiser, said officer applied to Gideon Buckingham, Esq. Justice of the Peace in said Milford, who appointed Lewis Mallet and John Buckingham indifferent freeholders of said Milford, to be the other appraisers, all of whom being duly sworn, appraised one piece of said land, being three acres and a half, at £75-15-0 lawful money; the other piece being fifteen rods, with a barn, horse-shed, and a place to weigh hay built thereon; at £69-10-0 lawful money, said officer's fees being £3-17-4, the whole of said execution amounting to £149-5-0 lawful money, and said Woodward on said 13th of February, set off said two pieces of land to the creditor in said execution, in satisfaction of the sums due thereon and said officer's fees; that said execution and the officer's endorsement thereon had been duly recorded in the records of said town of Milford, and in the office of the clerk of the superior court from whence it issued. The jury further found that on the 29th of March A. D. 1787, Edward Treat was seized in fee of said 15 rods of land, and by a certain indenture or instrument in the words following, (viz.) and recites the

indenture or lease, conveyed to the defendant said fifteen rods of land for the term of nine hundred and ninety-nine years, and said lease contains certain covenants on the part of said Carrington and his heirs, &c. to maintain a fence on a certain part of said premises, so as to prevent cattle passing through said Treat's land, and on failure thereof, to pay the damage, and if after notice the said lessee, his heirs and assigns shall fail to repair said fence or to pay the damage, it should be lawful for the lessor, his heirs, &c. to enter and expel the lessee and his heirs, &c. therefrom ; which instrument has been duly recorded, and the said Carrington hath held and enjoyed said premises ever since, until attached as aforesaid ; and the defendant had erected thereon a barn, horse-shed, a saddle house and a building to weigh hay in ; of all which buildings the defendant is the owner ; that the defendant was seized and possessed of said other piece of land in fee simple and hath continued in possession of both said pieces ever since said levy.

Now if the law be so upon the facts aforesaid, that the plaintiffs have right to recover both of said pieces of land, then the jury find that the defendant has done wrong and disseisin, &c. and for him to recover the whole of the demanded premises, and if the law be so that the plaintiffs are not entitled to recover said fifteen rods of land and the buildings thereon, then they find that as to said fifteen rods the defendant has done no wrong or disseisin ; but if the law be so, that the plaintiffs are entitled to recover the buildings standing on said fifteen rods but not the land, then the jury find for the defendant as to said fifteen rods of land, and for the plaintiffs to recover said buildings and said three acres and a half of land with £4-0-0 damages and their cost.

Three questions of law were made upon this verdict—First, whether, the execution obtained by said Frances when a *feme sole* might regularly be levied after her intermarriage ? Second, whether her appointing an ap-

praifer on this execution, after her intermarriage was valid ? And third, whether said estate for nine hundred and ninety-nine years passed to the creditor by the levy and appraisal aforesaid ? There not being time to argue the special verdict, the cause was continued to July term, A.D. 1794.—When after hearing counsel, learned in the law, upon the several points made, the court gave judgment that the law was so upon the facts found and stated in the special verdict, that the plaintiffs were entitled to recover the whole of the demanded premises.

And by the court—As to the first point, an execution in favour of a creditor who is a *feme sole* is not abated or altered by her intermarriage, but may be proceeded with and levied notwithstanding. As to the second point, the wife is the only creditor named in the execution and the only person who by law hath right to appoint an appraiser, and hath right to receive a transfer of real property without her husband—her acts during the coverture, may be avoided only by her husband's dissent, and the husband has evidenced his consent by joining with her in this action, to recover the land—at any rate the defendant cannot take advantage of it.

And as to the third point, by the laws of England, an estate for life is a freehold, and an estate for years be the term ever so long, is not.

The general division of estates in this state, is into real and personal, and there are some which seem to partake of the nature of both—and the statute directs how executions shall be satisfied ; the officer having an execution is first to repair to the debtor's usual place of abode, and make demand of the debt and charges, and upon neglect or refusal to pay, he shall levy the execution on any of the personal estate of the debtor, except necessary apparel, &c. ; and he shall draw an account of the particulars of the goods or estate he shall so seize and set up the same on the sign post in the town wherein he shall seize them ; and shall therewith, set up a declaration, that said

goods so posted are to be sold at that place at public vendue, at the end of twenty days—and in case said debt and charges are not paid within said twenty days, he shall proceed and sell them at vendue to the highest bidder, or so many as shall be necessary, &c.

The statute then enacts that all lands and tenements belonging to any person in his own proper right in fee, shall stand charged with all his just debts as well as his personal estate, and shall be liable to be taken in execution, for the satisfaction of the same—where the debtor shall not expose and tender personal estate sufficient to answer said debt and charges.—And whenever an execution shall be levied on lands, the same shall be appraised by three indifferent freeholders of the town in which the land lies; one of whom may be chosen by the debtor, and another by the creditor, and if they do not agree on the third, or in case either party neglect to choose, the officer shall apply to the next assistant or justice, who can judge between the parties, and he shall appoint one or more appraisers as the case may require, who shall be sworn according to law—and it shall be the duty of the officer who levies on lands, to cause said execution and his endorsement thereon to be entered in the records of said town, before he returns it to the clerk's office out of which it issued; and being returned to the office of the clerk from whence it issued and there recorded, shall make a good title in the party for whom taken, his heirs and assigns.—These are the only methods pointed out in the law, how executions are to be satisfied from the estate of the debtor; and they are totally distinct and different, as they respect the personal estate and the real estate—an estate in lands for nine hundred and ninety years, is most certainly not personal estate, it cannot therefore be sold at the post at public vendue by an officer, upon an execution, it is then to be considered as real estate, and is in fact a much greater estate than an estate for a man's life; it approximates the nearest to a fee, in point of duration, and in point of importance and value; and if it may not be taken to satisfy an execution in this

way, there is no way pointed out in the law whereby it can—and all the reasons in the law, why land and real estate should be appraised, operate forcibly, with respect to these kind of estates.

Thatcher *vers.* Prentice.

Payments made in public securities, upon a note given for public securities, apply according to their value when made.

ACTION upon a note dated the 1st of March 1788, which is as follows: Borrowed this day 309 dollars and 52-90, in final settlement certificates, dated 1st of December, A. D. 1783, and one continental certificate for 200 dollars, dated the 6th of February 1779, all on interest from their respective dates, to return on demand.

The case was defaulted and heard in damages.—The endorsements on the note were as follows, (viz.) Nov. 20th 1788, received 139 dollars and 8-90, that is to say, 59 dollars and 8-90 dated in December 1783, and interest thereon, and 80 do. dated in March 1784 and interest due thereon to the 31st of December 1784.

May 20th 1791, received two final settlement notes, one for 77 dollars and 59-90 with interest from the 4th of November 1783; one do. for 18 dollars with the interest from the 1st of January 1783.

The securities borrowed were estimated at their value when received—The question was whether the securities endorsed should be applied nominally on the receipt or note, or should be applied according to their value, at the time when paid? By the court, the rule must be to reduce the sums borrowed to lawful money, at the time when borrowed, and apply the endorsements at their value when made.

John Wilford *vers.* Rose.

An action of waste will not lie in favour of a remainder man against a stranger.

ACTION declaring that John Wilford, senior, deceased; in his life time was seized of certain houses and lands; and that in his last will and testament he gave said lands and tenements to his wife Elizabeth for and during the term of her natural

life; and after her decease he gave them to the plaintiff and the heirs male of his body lawfully begotten, and that he has heirs male of his body lawfully begotten; that said Elizabeth is still living, and that he is entitled to the inheritance upon her decease; and that the defendant without law and right and against the mind and will of the plaintiff, or said Elizabeth, did enter, cut and carry away 5000 trees, then and there standing,—damage £2500.

The defendant plead not guilty—Issue to the jury—The words of the will were, “I give to my wife Elizabeth, one half of my house, one third part of all my lands and meadows whatsoever and wheresoever, to be improved and enjoyed by her, during her natural life; and upon her decease, I give them to my son John Wilford, and the heirs male of his body lawfully begotten.”

A question arose what kind of an action this was—Trespass it could not be, for the plaintiff was never in possession; waste it could not be, for there was no privy between the plaintiff and defendant.

The plaintiff said it was an action in nature of waste.

Waste is something done by the tenant which injures the inheritance, to the prejudice of the heirs at law, or of those who are entitled to the reversion or remainder; and lies in England in three cases at common law—against tenant in dower, tenant by the curtesy, and against tenant by guardianship. The law having created these tenancies, will protect the inheritance against any waste committed by the tenants.—But said Elizabeth is created tenant for life by the last will and testament of her husband; in which, said premises are given to her absolutely to improve and enjoy during the term of her natural life, and the fair, reasonable construction must be, that it was without impeachment of waste, although not so expressed; as where an estate is given to a man and the heirs of his body, &c. the law considers him only as ten-

NEW-HAVEN COUNTY,

ant for life, and his heirs as having the estate in fee simple; but it was never thought that he was liable for waste, nor any who acted by his licence. —Verdict for the defendant and accepted by the court.

Russell *vers.* Tuttle.

Parol evidence admitted to prove a fraud in the assignment of a public security made in writing.

ACTION of the case for a fraud in selling and assigning to the plaintiff for a valuable consideration, a note purporting to be a genuine note, issued pursuant to an act of the general assembly of the state of North-Carolina, passed in December A. D. 1785, for the sum of £139-19-6 specie, on account and for the pay of a soldier in the line of the army; stating that the defendant, to induce the plaintiff to purchase said note, falsely affirmed that said note was fundable, and that such notes were sold for 6/8 on the pound in the market, and that he purchased it at that price, of all which the plaintiff was ignorant, and the defendant knew to be false, &c. The defendant plead not guilty—Issue to the jury.

The plaintiff offered parol testimony to prove the fraud, which was objected against, because the contract and assignment of said note was in writing.—By the court, the evidence is admissible, for this action is not laid upon the writing, but for the fraud practised by the defendant, to induce the plaintiff to take an assignment of said note, which can be proved no otherwise than by the testimony of witnesses.

Daniel Porter, &c. *vers.* Warner.

Hearsay from interested persons respecting ancient bounds not admissible.

ACTION of ejectment for certain lands. Plea, no wrong or disseisin; issue to the jury.

The question was respecting the bounds; the plaintiffs offered to give in evidence what a person, who was formerly owner of the land, and had sold

and warranted it, and now deceased, had said respecting the bounds; this was objected to; and by the court, hearsay evidence from old people who are dead, concerning ancient bounds, is admissible, it being the best evidence the nature of the case will admit of; but to admit hearsay from a man, who was interested in the question, would be deriving evidence from an impure source, which the law will not allow.

P. Edwards Esq. *vers.* S. Baldwin, Esq.

SCIRE FACIAS against Baldwin as agent, factor, &c. of Mark Leavenworth, an absent absconding debtor. The general issue plead, the question to the court was whether the defendant was agent, factor, &c. to said Leavenworth, and had of his effects in his hands, when he was served with a copy of the plaintiff's original process against Leavenworth; it appeared in evidence, that the defendant had the effects of said Leavenworth in his hands but had given a credit to him previous to said copies being left, to the amount of part of the effects he had in his hands; and that after said copy was left, he gave a further credit to said Leavenworth to the amount of all the effects he had in his hands. Upon this state of facts the court were of opinion, that so much of said effects as were necessary to discharge the credits given by the defendant previous to his being served with a copy of the plaintiff's original process were not to be considered as said Leavenworth's effects, in his hands, but were to be retained by the defendant, and the residue, to be considered as the effects of said Leavenworth in his hands, and may not be retained to discharge those after credits.

A garnishee may not retain effects of his absconding debtor to pay credits given after he was copied.

Elijah Williams, Esq. *vers.* The County of New-Haven.

PETITION to the county court, complaining, that he recovered a lawful judgment and had executed only given, *Special damages*

an escape thro'
the insufficiency
of the gaol.

cution against Charles Hall, for the sum of £79-7-1 lawful money debt and cost; that said Hall was committed to prison on said execution, in the county gaol in New-Haven, and took the oath provided for poor imprisoned debtors, and that the plaintiff had expended £9 in supporting him in prison, and that on the day of he made his escape from prison through the insufficiency of said gaol, whereby he had lost his debt and what he expended in supporting said Hall in prison.

The defendants plead that said Hall did not escape through the insufficiency of said gaol. Issue to the court—The court found that said Charles Hall did escape through the insufficiency of said gaol and gave judgment for the plaintiff to recover of the defendants £30 the special damages only. Vide *Staphorse v. County New-Haven*, Root's Rep. 126, 1. vol.

Polly Leister *vers.* Sally Smith.

In actions of slander, under certain circumstances the defendant may prove of whom he heard the words, in mitigation of damages.

ACTION of defamation, for uttering and publishing certain false, scandalous and defamatory words of and concerning the plaintiff.

Plea not guilty—Issue to the jury.

The witness testified, that at a certain time she heard the defendant speak the words charged in the declaration, and the defendant said that she heard the words from one Draper, and offered evidence to prove that Draper did tell her the story previous to her speaking the words, in mitigation of the damages; which was objected against—but admitted by the court, on the score of damages only, for although her having heard it from Draper could not justify her repeating the scandal, yet it may lessen the presumption of her having spoken the words maliciously.

*The Def
witness
probably;
likely the
Case in I. Binney.*

Clinton *vers.* Hopkins.

ACTION for a malicious prosecution, brought against the plaintiff at Montreal in the province of Canada. The parties were at issue to the jury upon special pleadings.

The court will not take a cause from the jury upon the motion of one of the parties against the mind of the other.

The plaintiff produced a writing purporting to be a copy of the original complaint and warrant; by which the plaintiff stated in his declaration, he was falsely and maliciously prosecuted; certified to be a true copy by Thomas M'Cord jun. justice of the peace.

This exhibit was objected against, as coming from a foreign jurisdiction; and without any evidence to shew that Thomas M'Cord jun. was a justice of the peace, and till that was done no faith or credit should be given to his attestations. The writing offered was not admitted. This being the only exhibit relied upon by the plaintiff to prove that point, he moved that the cause might be taken from the jury and continued; which the defendant objected against.

By the court—The parties have come prepared for trial and have put themselves on the jury, and in the course of the trial the plaintiff finds he is disappointed as to his proof, and requests the court to take the cause from the jury and continue it; this may not be done, without the consent of the defendant.

Fowler *vers.* Norton.

PETITION for a new trial, in action of ejectment, for certain lands lying in Branford in the county of New-Haven, where said Fowler dwelt, which was tried by the jury. Barker and Frisbee who lived at Frederickburgh in the state of New-York, had sold and warranted these lands to said Fowler, and were cited in by him to vouch and de-

Depositions taken within 20 miles of the vouches without citing them, where the nominal party lived more than 20 miles from the place of caption, are not legally taken.

FAIRFIELD COUNTY,

fend the title ; said Norton went to said Fredericksburgh, where said Barker and Frisbee the vouches lived, and took depositions within twenty miles of them, without notifying them, said Fowler the defendant then living at Branford, more than twenty miles from the place of caption. These depositions were objected against, on the ground that they were not legally taken, because the vouches were not notified ; and by the court were excluded—For Barker and Frisbee have taken upon them the defence of the title in this case, they are therefore really the parties interested, though the suit is in the name of Fowler.

Fairfield County, August Term, A. D. 1793.

Halluck vers. Bush.

A deed given for the use of another without his knowledge is good, until he disavows.

ACTION of ejectment for three pieces of land described in the declaration. Plea no wrong or disseisin—Issue to the jury.

The plaintiffs title was a mortgage deed, dated the 11th of September, A. D. 1784, and recorded the 5th of November, A. D. 1784, from one Nathaniel Peck who was owner of the land.

The case was, Nathaniel Peck was indebted to the plaintiff in four notes ; one for £400, one for £50, both payable before September A. D. 1784 ; one note for £50 and one for £40 which were not then due ; and for security of all said notes said Peck agreed in the month of August A. D. 1784, to give a mortgage of certain lands ; Halluck came up in September, Peck not being at home, enquired of the town clerk for said mortgage and finding none had been given, he attached part of said lands and other lands upon the two first notes. When Peck came home he was informed what Halluck had done ; he

recognized said agreement and immediately made out a mortgage deed to Halluck, and lodged it with the town clerk for record, Halluck having gone home. Halluck recovered judgments on his two notes, took out executions on said judgments, levied, and had them satisfied, partly by other lands of said Peck, and partly by lands contained in said mortgage deed. This was done on the 5th of June A. D. 1785; at which time Halluck first took up said mortgage deed. Peck was also indebted to Bush the defendant, who caused the lands contained in said mortgage deed, which were not attached by said Halluck, to be attached on the 5th of April, A. D. 1785, and the lands attached by Bush, were not taken by Halluck's execution, and to which he had no title but said mortgage deed. Bush recovered judgment, took out execution and levied it on the lands contained in the mortgage, and had them set off in satisfaction of his execution.

The question of law upon these facts was, whether the deed from Peck to Halluck, under the circumstances, was a valid deed, being executed by Peck without the knowledge of Halluck; and whether as Bush's attachment was laid on before said deed was accepted by said Halluck, the attachment ought not to hold in preference to said deed.

Verdict was for the plaintiff and accepted by the court upon the ground, that a deed executed and delivered for the use of another, is good, until disavowed to by him for whose use it was made.

Brook *vers.* Williams.

ACTION upon the statute for the regulation of maritime affairs—Declaring that on the 20th September 1786, the plaintiff and defendant with six other persons were joint owners of the brigantine Sally, lying in the harbor of Norwalk; that the defendant was owner of three eighths of said brigantine, and that the plaintiff was master; that a major

The master's remedy is against the bottom of the vessel for a neglecting partner's share of the outfit.

part of said owners agreed to load and send her on a voyage to the windward islands, in the West-Indies with a cargo of horses, oxen, corn and lumber, and notified the defendant of their agreement and of their meeting to conclude upon said voyage; and for him to furnish his part of the cargo by the 10th of October A. D. 1786, agreeably to the law in such case provided; and that the defendant wholly refused and neglected to furnish his part of said cargo; and the plaintiff as master did set forth and furnish the defendant's part of said cargo, upon the bottom of said brigantine, agreeably to the law; that he proceeded with said brigantine and cargo on said voyage to said windward islands, and disposed of said cargo to the best advantage it could be done, and returned to said Norwalk in May A. D. 1787, with the avails of said cargo; that a loss of £184 was unavoidably sustained in said voyage, the defendant's proportion being three eighths, is £69 lawful money; and that soon after his return he notified the defendant of his proceedings on said voyage, and of the loss sustained, and of his part to pay, and demanded of him said £69 which the defendant refused to pay, &c. whereby an action had accrued to the plaintiff to recover, &c.

To this declaration the defendant demurred—and judgment was given that the declaration was insufficient.

By the court—The statute is, “where any owner of a vessel having been notified, refuseth or neglecteth to set forth and furnish his part of the cargo—the master of such ship or vessel may take up upon the bottom of said vessel for the setting forth of the said part; which being defrayed, the remainder of the income of such part shall be paid by the master to the said owner.”

In this case, the avails of the cargo were not sufficient to pay the outfits by £69. The bottom, the original fund, is to be resorted to for payment, and not the owner; for the law never intended in such case,

that the neglecting owner should be charged beyond his interest in the vessel, and the master must look to that only for his indemnity.

Cannon *vers.* Hallet, Hazzard, &c.

PETITION in chancery for a foreclosure of the equity of redemption in certain mortgaged premises—

A second mortgagee shall not be foreclosed of his equity of redemption if he will pay the debt due to first mortgagee.

Shewing that on the 8th of September A. D. 1763, Jonathan Burrel and wife mortgaged certain lands to the petitioner to secure the payment of a debt of £400 lawful money and the interest. That afterwards on the 16th of February A. D. 1765, said Burrel and wife gave a second mortgage of the same premises to said Hallet, &c. to secure the payment of £600 money of New-York and interest, and that on the 17th of September A. D. 1791, the heirs of said Burrel and wife, they being dead, for the consideration of £5 released to the petitioner their equity of redemption in said mortgaged premises. That the buildings on said premises were burned by the enemy in the time of the war—and on the 28th of October A. D. 1779, the petitioner sold a water lot, part of said premises, to Compstock and Middlebrook, for £150 lawful money, on which they erected a store of the value of £150—That in June A. D. 1791, having before that time been notified of said second mortgage to said Hallet, &c. the petitioner took possession of said mortgaged premises, erected a house thereon, worth £270 lawful money, and made other repairs of the value of £15—That said estate exclusive of said new erected buildings was not worth more than £500 lawful money, and that the debt due to the petitioner and interest amounted to £932—praying that the petitioners may be foreclosed of their equity of redemption in said premises, upon their failing to pay said debt and interest, and also for said new erected buildings and repairs.

FAIRFIELD COUNTY,

Upon a hearing of the petition on the merits, the court found that the new erected buildings and the repairs were all subsequent to the petitioner's knowledge of said second mortgage to said Hallet, &c. and thereupon the court ordered and decreed that the respondents be foreclosed of their equity of redemption on their failing to pay said debt and interest only, and not otherwise; for the petitioner had no right to incumber the estate after he had notice of said second mortgage to the prejudice of the second mortgagee. What will be equitable for the petitionees to pay when they come to redeem, will be another question, but if they pay the debt, they may not be foreclosed.

The court will not foreclose the equity of redemption against the mortgagor or second mortgagee, if the original debt secured by the mortgage is paid, altho' other sums may be due and must be paid in order to redeem.

Lyon *vers.* The County of Fairfield.

Action at law
doth not lie a-
gainst a county.

ACTION of debt by book—Plea, owe nothing. Issue to the court. The parties being informed by the court that the point had been settled, that an action at law did not lie against a county; the plaintiff was nonsuited, and cost allowed to the defendants upon objection made against it. Samuel Sheldon *vs.* County of Litchfield. Root's Rep. 158, 1 vol.

Perkins, Administrator of Mary Perkins, *vers.*
Samuel Burnet.

Hearlay from
the agent of the
defendant may
be given in evi-
dence against
him.

ACTION of indebitatus assumpsit, for money had and received. The plaintiff offered to prove what Bradly the defendant's agent, who received the money for him, had said. This was objected against, because he was neither party nor witness in the cause—But by the court, the evidence was admitted, he being the agent of the defendant and received

the money for his use ; what he said and did in that transaction is the same as said and done by the defendant.

Hilliard verſ. Nickols.

PETITION for a new trial. The petition was addressed to the superior court to be holden at Danbury on the 12th day of August A. D. 1793.—The court set on the 2d Tuesday, which was the 13th day of August.—The citation to the respondent was, that he appear before the superior court to be holden on the 2d Tuesday of August A. D. 1793.

Where the petitioner cites the respondent to appear before the court, he must pay cost, altho' his petition is not addressed to the court.

The defendant plead this in abatement, and the plaintiff moved to have said petition erased from the docket, as not being before the court ; but the court would not order it to be erased ; upon which the petition was withdrawn, and cost allowed to the defendant ; for although the petition was not before the court, yet the defendant was ; having been cited by the petitioner to appear, it was reasonable he should have his cost.

Joseph Plat Cook, Esq. verſ. Lynn Osborn.

ACTION of debt on a probate bond ; condition, that Jonathan Osborn administrator of Jonathan Osborn deceased, should well and faithfully administer upon the estate of said Jonathan, deceased, alledging a breach in the condition, &c. The defendant plead in bar, that he caused a true and perfect inventory to be made and exhibited to the court of probate, of all and singular the goods, chattles and lands of said deceased, of which he died seized and possessed, &c. &c.

Hearſay from the widow of the intestate reſpecting his insanity at the time of giving a deed of his land, not admitted.

The plaintiff replied that said Jonathan deceased, in his life time, on the 13th of October, gave a deed to one of his heirs, of an hundred acres of land, and a bill of sale of a number of articles to another ; and that at the time of giving said deed and said bill of

FAIRFIELD COUNTY,

sale, said Jonathan was insane, so that nothing passed by them, and neither said land nor said articles have been inventoried by said administrator.

The defendant traversed said intestate's being insane at the time of executing said deed and bill of sale. Issue to the jury.

The plaintiff offered to give in evidence to prove said Jonathan's insanity, what the widow of said deceased had said, which was objected against—And by the court it cannot be admitted, and that upon three grounds : In the first place, she is neither a party nor a witness in the cause ; nor doth the defendant claim any thing from or under her—2d, She is interested in the event of the suit ; for if the deed is set aside, she will be entitled to dower in these lands—3d, What she has said may be evidence against herself, but cannot be evidence against the administrator or the defendant.

Tomlinson *vers.* Booth.

In trespass, evidence of the defendant's disorderly conduct admitted to be proved.

ACTION of trespass for shooting and wounding the plaintiff's horse as the troop of horse were manœuvring with the foot company on training day ; the plaintiff being a lieutenant of the horse, and the defendant a sergeant of the foot.

Plea—not guilty. Issue to the jury.

The defendant offered to give evidence that the plaintiff at sundry times before this, had been disorderly and crouded upon the foot, on that day ; this was objected against,—and by the court,—The defendant may give evidence of the plaintiff's breaking orders, and crouding upon the foot, in different parts of the parade, in their manœuvring at that time only.

Fairweather *vers.* Curtis, &c.

Hairs, legatees and creditors, may appeal

APPPEAL from the judgment of the court of probate in accepting the return of commission-

ers on the estate of Jonas Curtiss, represented insolvent.

Reasons for the appeal—Jonas Curtiss in A. D. 1789, made his will, gave fundry legacies, and appointed an executor, and died in A. D. 1792; his executor refused the trust, and the court of probate appointed Edmund Curtiss, jun. and John Curtiss, administrators, with the will annexed; that they represented said estate insolvent, and had commissioners appointed, and procured them to report a list of debts, among which was a debt by book, allowed to said Edmund one of said administrators of £8-3-6, a debt to said John Curtiss, the other administrator, of £9-18-7, to Jonas Curtiss a debt of £109, and to Sarah Curtiss £81; which said Jonas and Sarah are brother and sister of said administrators—which sums though not sufficient to make said estate insolvent, yet will swallow up a great part of the estate and deprive the legatees in a great measure of their legacies, of whom the appellant is one, when in truth and in justice there was little or nothing due to said administrators, nor to said Jonas and Sarah Curtiss.

The appellee plead in abatement of this appeal, that the doings of the commissioners were final, and that no appeal lay in such case.

By the court—The plea in abatement is insufficient. Vide Staniford, &c. *vs.* Hide, Root's Rep. 263, 1 vol.

This cause was continued to the superior court holden at Fairfield, in January A. D. 1794; and on a full hearing on the merits, the judgment of the court of probate was disaffirmed; and this judgment was afterwards carried to the supreme court of errors, and there affirmed.

The statute allows executors and administrators to contest at law the claims of creditors, notwithstanding they have been allowed by commissioners; by the same parity of reason, creditors, legatees and heirs,

may contest the claims of executors, &c. notwithstanding the allowance of commissioners.

Nathaniel Williams *vers.* Lemuel Brooks.

The share of one joint owner in a vessel, being attached doth not affect the right of the other owners.

ACTION of the case, declaring that on the 1st of June A. D. 1787, the plaintiff and defendant with sundry other persons were joint owners of the brigantine Sally, lying in the harbor of Norwalk; that the plaintiff owned nine sixteenths and the defendant two sixteenths; that the plaintiff being about to remove said brigantine to Long-Island, as he had right to do, in order to repair and fit her out on a voyage; the defendant applied to William St. John, who held a note against the defendant of about £70 lawful money, and procured him to attach the defendant's share in said brigantine on said note, and which was accordingly done by the procurement of the defendant; and said brigantine was held and detained from the plaintiff until the November after; whereby he lost the run of said brigantine, and also received much damage in her hull, by the detention aforesaid.

Plea—not guilty. Issue to the jury.

There was very little room for dispute about the facts. The question of law was, whether the attachment made any alteration in the condition of the vessel. The plaintiff's right remained the same as before the attachment. The attaching creditor, or officer, could acquire no greater right in the vessel than the debtor had.

Verdict was for the defendant and accepted by the court, upon the ground that the plaintiff's right to remove said vessel was not affected by the attachment. Before the attachment he would have been accountable to the defendant for his part, and now he would be accountable to the officer or attaching creditor. The plaintiff's not removing said vessel as he otherwise would have done, was owing to his own negligence or mistake of the law.

Litchfield County, August Term, A. D. 1793.

Riggs vers. Woodruff.

ACTION of trespass, for a trespass committed on land, of which the plaintiff alledged that he was seized and possessed; brought before a justice.

A plea of title from a justice may not be altered—a plea of title may be good to remove a cause, and yet be insufficient to justify the defendant.

The defendant plead, that Anna Woodruff owned the land on which the trespass was said to have been committed, in fee, and that by licence from her he entered and did the facts complained of. Upon which the justice took bonds and handed the cause over to the county court. The plaintiff demurred to the plea, and the cause was appealed to this court; and the defendant moved for liberty to alter his plea, but not allowed.

The plaintiff then moved to have the cause erased from the docket; this also the court refused to order, and heard the cause on the demurrer; and gave judgment that the defendant's plea was insufficient, and for the plaintiff to recover.

The cause is well before the court; for an insufficient plea of title, is a plea of title as well as where the title is well and sufficiently set forth.

James Bird vers. William Holabard and Wife.

PETITION in chancery—Shewing that Amos Bird, died in A. D. 1773, intestate, leaving a plentiful estate, and was largely indebted to the petitioner; that he left a widow and one child, now the wife of said Holabard; that his widow married Reuben Smith, who took the estate of said Amos into his possession and care, the daughter being young; that in A. D. 1789, he exhibited his demand against the estate of said Amos, to said Reuben, supposing him to be the rightful administrator of said Amos, and agreed with him and did submit said claim to arbitration; and they mutually gave bonds to abide

Chancery will not sustain a suit if it appears the party has adequate remedy at law.

the award ; and upon a full hearing said arbitrators awarded said Reuben as administrator to said Amos, to pay the petitioner £ 174-19-7, being the sum found due from said deceased's estate ; that said Reuben was not administrator of said Amos, and refuses to perform said award ; and the bond given by him to abide said award is by some unaccountable accident lost. That soon after this, the daughter being married to said Holabard, they brought an action of account against said Reuben for her father's estate which he took into his possession, demanding £ 1000 damages ; in which action auditors were appointed, who made return that they found due to the plaintiffs in said action, from said Reuben, £ 569-10-9 lawful money, which return was accepted and judgment rendered thereon for that sum and cost ; that execution had issued on said judgment, and the whole of said Reuben's interest was taken to satisfy it, and he is now a bankrupt ; that said Amos left a plentiful estate to pay all his debts, and praying that said William Holabard, &c. should be ordered and decreed to pay his debt out of said Amos's estate.

To this petition a demurrer was given—and judgment, that the petition was insufficient.

The petitioner has not shewn in his petition any debt he has against said Amos, for the award stated under the circumstances, is no evidence at all of a debt due from said Amos, and cannot be enforced against the petitionees, and no good reason is assigned why said claim lay from A. D. 1773, to A. D. 1789. No excuse is given for his mistake in supposing said Reuben was the administrator of said Amos ; further, he has a plain adequate remedy at law, if any where, by taking administration on the estate of said Amos Bird, and the estate of said Amos in the hands of the petitionees, will be liable at law to pay said debt, unless barred by the statute of limitation.

Atwood verf. Whittlesey.

W RIT of error to reverse a judgment of a justice in an action brought by said Whittlesey against said Atwood, on a note dated the 15th of May A. D. 1792; for £9, payable on the 1st of January, A. D. 1793, with the lawful interest. The defendant plead in bar—That long before and at the date of the note on which, &c. the plaintiff was deputy sheriff, and had two executions against the defendant and Samuel Carr, for the sum of £31-10, in favor of James Armstrong; that in April A. D. 1792, he levied them on the estate of the defendant, and took his receipt for the delivery at the post; that on the day said estate was to be delivered, the plaintiff proposed to settle said executions and take good responsible men's notes on interest payable the 1st of January then next for said executions and for his fees, which was £3; and that said Carr should pay him £4-4 lawful money over and above, for forbearance and giving day of payment for the aforesaid sums; to which proposals the defendant and said Carr agreed, and gave their notes. for the sums in said executions and the fees, which the plaintiff accepted, payable the 1st of January 1793, with interest, the note on which being one. And in pursuance of the proposals and agreements aforesaid, it was then and there corruptly agreed, between the plaintiff and defendant and said Carr, that said Carr should pay the plaintiff said further sum of £4-4 for forbearance and giving day of payment on said notes, the note on which being one. And said Carr did accordingly then and there by parol agree to pay the plaintiff said sum of £4-4 over and above the lawful interest, for forbearance on the aforesaid notes, and for no other cause or consideration; and said Carr had in fact paid two dollars towards said sum of £4-4 in execution of said corrupt agreement; and thereupon the note on which, &c. was usurious and void by the statute.

A parol promise to pay more than lawful interest, made at the giving of a note and to induce the creditor to take it, and is part and parcel of said contract will make the note usurious and void.

The plaintiff replied to the plea in bar, that said Carr never did pay two dollars nor any other sum to—

LITCHFIELD COUNTY,

wards or on account of said £4-4 for forbearance and giving day of payment.

The defendant rejoined, that said Carr did pay said two dollars on account of said £4-4 for forbearance, &c. On which the parties were at issue.

The justice found that said Carr did not pay two dollars nor any other sum to the plaintiff on account of said £4-4, in manner and form as the defendant in his plea and rejoinder had alléged, and gave judgment for the plaintiff to recover.

Errors assigned—1st, That the issue was immaterial—2d, That the plaintiff's reply was insufficient and no answer to the defendant's plea in bar.

By the court,—The question of law to be decided upon the facts in this case, is, whether a note given for a just debt, is rendered usurious and void, by a parol agreement made by the debtor at the time of giving said note, to induce the creditor to accept it and give forbearance, to pay a sum over and above the lawful interest at six per cent. per annum. The court are of opinion that such note is usurious and void by the statute; and the judgment of the justice is reversed. Considering the whole as one entire contract, to secure to be paid to the plaintiff the sums in the executions, the officer's fees, and £4-4 for forbearance; the two first to be secured by notes, the last by Carr's parol agreement. In this point of view, it seems that the whole contract is corrupt, it being one entire agreement, and cannot be distinguished.

Some of the court doubted, whether this was to be considered as one entire contract and agreement; and whether Carr's agreement to pay said £4-4, was not distinct from the agreement to give the notes; and being a parol agreement was void upon the face of it.

This judgment was afterwards affirmed in the supreme court of errors.

Bacon *vers.* Curtiss.

ACTION of ejectment for two parcels of land, containing thirty acres. Plea—no wrong, &c. A creditor who redeems lands sold for taxes before the year is up has right to hold the land until the debtor will do him equity.
Issue to the jury.

The plaintiff's title to 16 acres of the demanded premises was a deed from the defendant; as to the other 14 acres, they were taken by a collector and sold for the defendant's taxes; said Bacon as creditor to Curtiss, went within the year and paid the taxes, double interest and cost; and took a deed from the purchaser; at the end of the year from the sale, Curtiss having failed to pay said taxes &c. said deed was recorded. Sometime after, Curtiss tendered the money due for taxes, double interest, and cost to Bacon, which he refused, unless Curtiss would do entire justice by paying him what he owed him otherwise. The defendant insisted that by tendering the taxes, double interest and cost, although after the year, it defeated the title of the plaintiff to the 14 acres by force of the statute. Is was insisted by the plaintiff that the title, after the year was elapsed and the collector's deed recorded, became absolute both in law and equity; but if not, the defendant can have no more than an equity of redemption; and to entitle him to redeem, he must first do equity to the mortgagee. The jury found a verdict for the plaintiff to recover the whole thirty acres, which was accepted by the court—under an idea that a creditor redeeming an estate sold for taxes, in this manner, cannot be considered after the year is elapsed and the deed recorded, in a less favorable point of light, than a mortgagee, after the condition is forfeited and the estate become absolute at law.

Borden *vers.* Kingsbury.

ACTION upon the covenants of seisin in a deed, alledging that the defendant was not seized, &c. A devise to a man and the heirs of his body lawfully be-
The defendant plead that he had kept and performed

gotten is an estate for life only in the first donee.

his covenants in said deed. Issue to the jury. The jury found a special verdict as follows: In this case the jury find that John Whiting, sen. deceased, in A. D. 1760, was seized in fee of said bargained premises, and by his last will and testament since duly proved and approved, devised said lands to his son John Whiting and to the heirs of his body lawfully begotten; that said John the son, on the 28th of September A. D. 1766, then having issue of his body lawfully begotten, executed and gave a good warrantee deed of said land to Simon Baxter, which deed was acknowledged and recorded; that said Baxter gave a like deed of said land to the defendant; and the defendant gave the deed mentioned in the plaintiff's declaration; that said John Whiting the son died in September 1789, leaving heirs of his body lawfully begotten, and the plaintiff hath ever remained in the possession of said land. Now if the law be so, that John Whiting the son, on the 28th of September A. D. 1766 was not seized in fee simple of said land and had not good right to convey the same to said Simon Baxter, then the jury find that the defendant has not kept and performed his covenants, &c. and find for the plaintiff to recover £75 lawful money damages, &c. but if the law be otherwise, then the jury find that the defendant has kept his covenants, &c. and for him to recover his cost.

The court at January term, A. D. 1794, gave judgment that the law was so upon the facts found, that said John Whiting the son, on the 28th of September, A. D. 1766, was not seized in fee simple of said land, and that the plaintiff recover £75 damages and cost. This point has been repeatedly adjudged in this court and in the supreme court of errors; that if it be possible to settle a point of law, this must be considered as settled. 1st Vol. Root's Rep. Manwaring *vs.* Taber, 79; and Allen *vs.* Bunce, 96. Kirby's Rep. 175, Chapel *vs.* Brewster; and Wells, &c. *vs.* Olcott, 118.

Edward Pond *vers.* Peter Pond.

ACTION of account for £31-14-3 money's worth of goods received, of James M'Evers, on account of Jabez Bacon, to sell, dispose of and make profits, and to account to the plaintiff therefor; for which the defendant gave his receipt in writing as follows, viz. May 2d, A. D. 1765, received of James M'Evers £35-14-3 value in goods out of his store, on account of Jabez Bacon. Signed, Peter Pond. Underneath is wrote, the above I promise to account for to Edward Pond. Signed, Peter Pond. As by said writing ready in court to be shewn appears, that the defendant had sold and disposed of said goods to a profit, and had never accounted for them, although often requested and demanded, &c. Writ dated 19th of April, A. D. 1791. The defendant plead in bar the statute of limitation; that more than seventeen years had elapsed, exclusive of the time of the war, since a right of action had accrued on said writing.

An action of account not barred by the statute of limitations although it counts upon a receipt in writing.

The plaintiff replied that the defendant immediately after receiving said goods went out of this state into Canada, and had resided there ever since, until within six months before the date of the plaintiff's writ.

The defendant rejoined that he ever had real estate lying in Milford, on which his wife and family dwelt, during the whole time of his absence, which might have been taken; and which was sufficient to answer said demand and was now attached on this suit.

Plaintiff demurred to the rejoinder.

Judgment—That the rejoinder of the defendant is insufficient, and that the defendant do account.

By the court—This is an action of account, and not an action upon the writing, although it is set forth in the declaration to shew the grounds of the defendant's accountability; and actions of account are not within the statute.

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LITCHFIELD COUNTY,

Pitkin *vers.* Flowers.

In chancery the
alleged value
of the land in
the petition
gives the rule
for sustaining
jurisdiction.

PETITION in chancery, concerning a deed of thirty two acres of land, alledged in the petition to be of more value than £100 lawful money.— On the trial the witnesses testified, that the land was not of more value than 40s per acre; upon which a question was started, whether this court had jurisdiction of the cause, said thirty-two acres of land being the only matter in dispute, which appeared by the witnesses to be worth no more than £64. This brought up another question, viz. Whether the alledged value in the petition, or the real value, as proved upon the trial should be the rule. The words in the statute respecting appeals in civil causes, and in the statute respecting cases in chancery, which are cognizable in this court, are similar; and the court was of opinion that they should receive a similar construction, and at law, in actions sounding in damages, where the thing is of uncertain value, the declared value is the rule; and accordingly the court sustained jurisdiction and granted the petition.

Phineas Smith *vers.* Simeon Smith.

An action of account, which
shews a special
agreement
how the money should be
applied, and
to account
therefor is not
double.

ACTION of account, declaring that the said Phineas and Simeon were traders in company for the space of eighteen months from A. D. 1788, and to share equally in the profits and loss of said trade; that the defendant on the dissolution of said partnership received into his custody all the company's book accounts being three in number, describes them; on which were balances due to said company to the amount of £400 lawful money; which accounts the defendant received to collect, and to apply one half of the sums in payment of a note which he held against the plaintiff, and his reasonable account thereof to render, to the plaintiff; and that the defendant had collected said accounts, and had not applied any part thereof in payment of his said note, nor had he ever rendered any reasona-

ble account thereof, though often requested and demanded ; damage £300.

To this declaration a special demurrer was given. 1st exception, That the declaration was too general and uncertain. 2d, That it was double, containing matters of account, and also an express contract. Judgment, that the declaration is sufficient, and that the defendant do account.

The declaration is not double, but only shews how one half of the money was to be applied, which had it been done, would have been good accounting for so much, but not being done the defendant is accountable for the whole.

Jabez Bacon *vers.* *Samuel Masters.*

ACTION on book, describing the defendant to be late of Washington in the county of Litchfield, now an absent absconding debtor ; and in his writ directed a copy to be left with Nicholas S. Masters of New Milford, agent, factor, attorney and trustee to said Samuel Masters.

In an action against an absconding debtor, he may not plead in abatement that the garnishee is not his factor, and hath no effects of his in his hands.

This writ was served by leaving a copy with Nicholas S. Masters, and also by leaving a copy at the defendant's last usual place of abode in said Washington.

The defendant by his attorney Nicholas S. Masters plead in abatement, that the defendant had not for more than five years last past inhabited and dwelt in any place in this state, but had resided and been an inhabitant of the state of New-York ; and that said writ had been no otherwise served, than by leaving a true and attested copy at the defendant's last usual place of abode in said Washington, and a like copy with Nicholas S. Masters, as agent, factor, attorney and trustee to the defendant, and that said Nicholas S. Masters, is not, nor was when said copy was left in service, agent, factor, attorney or trustee to the defendant, nor had any of his effects in his hands, at the time of leaving said copy with him in service.

LITCHFIELD COUNTY,

The plaintiff replied, that said Nicholas S. Masters is and was, when said copy was left with him in service, agent, factor, attorney and trustee to the defendant, and had of his effects in his hands ; on which the parties were at issue to the court ; and Nicholas S. Masters as attorney to the defendant offered himself to prove that he had none of the effects of the defendant in his hands when said copy was left, and that he is not, nor was agent, factor, attorney or trustee to the defendant.

By the court—The garnishee is interested in the event of the suit, and by the rules of the common law cannot be admitted to testify in this stage of the cause, and is let in to testify by the statute only on the scire facias.

The judgment of the court is, that the plea in abatement is insufficient ; and the issue joined thereon inadmissible, and immaterial in this stage of the case, and that the defendant answer over to the action.

It is a matter of no consequence, whether Nicholas S. Masters had of the defendant's effects in his hands or not, for the purpose of obtaining a judgment against the defendant ; if there had been no other service of the writ, but a copy left with him, it then might have been a matter of consequence, whether he was attorney to the defendant or not, for the purpose of notice ; but in this case a copy was left at the defendant's last usual place of abode in Washington, in conformity to the law.

This statute is a remedial statute, and is to be construed liberally in advancement of the remedy and in suppression of the mischief. The mischief which the statute designed to remedy, was debtors concealing their property in the hands of others, and absconding ; whereby it could not be got at, by the ordinary process of law, nor be proved otherwise than by the oath of the trustee, &c. The leaving of a copy of the action, brought against the principal describing him therein to be an absconding debtor, with the agent, factor, trustee, &c. secures the property in his hands,

to respond the judgment which shall be obtained against the principal ; and the discovery of the agent, &c. upon oath, which he is compellable to make, upon the scire facias brought against him, brings it forth to view in order to be applied in satisfaction of the judgment against the principal, if the defendant might put the plaintiff to prove, that the garnishee had of the effects of his debtor in his hands in this stage of the cause, the salutary provision of the statute would be in a great measure, if not wholly defeated.

Simeon Smith *vers.* Holebrook, Willard and others.

ACTION of the case for a fraud in passing to the plaintiff a false, forged and counterfeit continental certificate, for 5,325 dollars in exchange for smaller ones which were good, &c.

Plea not guilty. Issue to the Jury.

The continental certificate passed to the plaintiff, was seized by William Imlay, Esq. loan-officer at Hartford, and held on account of its being a counterfeit. The plaintiff offered said Imlay's deposition, inclosing a copy of said certificate to prove it to be false and counterfeit. The council for the defendants objected against its going to the jury or any evidence respecting said certificate's being counterfeit, other than the confession of the defendants, until said certificate challenged to be counterfeit was produced in court, that the triers might see and judge for themselves.

By the court—The deposition and copy are not admissible without producing the original. *State vs. Olborn.* Root's Reports 152, and *State vs. Blodget*, 534, 1st vol. upon which the plaintiff moved that the cause might be taken from the jury and continued. To this the defendants objected, that it was the plaintiff's own fault that he did not come prepared to make out his case. The court said they could not take the cause from the jury without the consent of the de-

Evidence of a certificate's being forged, not admissible without producing it—The court will not take a cause from the jury on motion of one of the parties without the consent of the other.

HARTFORD COUNTY,

defendants, in order to continue it—upon which the plaintiff was non-suited. See the case of *Clinton vers. Hopkins*, at New-Haven, this circuit.

Hartford County, Sept. Term, A. D. 1793.

Smith vers. Pitkin.

Interest allowed on the consideration paid, in an action on the covenants of seisin in a deed.

WRIT of error to reverse a judgment of the county court, in an action brought by Pitkin against Smith, on the covenants of seisin in a deed, which was defaulted, and on a hearing in damages, the court gave judgment for the consideration money paid for the land and the interest.

Error assigned.—That said court ought to have given judgment for the consideration only without interest.

Judgment.—Nothing erroneous.—The money was advanced by the plaintiff for a consideration that has wholly failed; it is but reasonable he should receive interest for the money advanced.

Hobart vers. Norton.

A security taken for six per cent in specie, for the interest on soldier notes not usurious.

WRIT of error, to reverse a judgment of the county court, in an action brought by Norton against Hobart, on a note for £62-14-5 lawful money, dated the 30th of March, A. D. 1790, and on interest.

The defendant plead in bar that on the 25th of August A. D. 1786, he borrowed of the plaintiff £300 in soldiers notes, on which was due £23-11 for interest, that he gave the following notes, (viz.) one for £300 payable the 1st of July 1787, in soldiers notes without interest; one for £23-11 payable in certificates for interest, on the 1st of July A. D. 1787, and one for £13-16 payable the 1st of June A. D.

1787, in specie, that said public securities were not then worth more than 10*s*. on the pound ; that July 28th, A. D. 1787 he paid £100 in soldier's notes ; that the plaintiff refused to wait longer on him, unless he would take up said note of £13-16 and give a new note for £16-16-9, payable in specie on demand and on interest ; and would also secure to be paid to the plaintiff 20*s* specie per month for the interest of said £200 soldier's notes, which remained still due ; all which the defendant then and there did and performed by the corrupt agreement between the plaintiff and defendant ; that on the 30th of March A. D. 1790, the defendant paid £142-14-7 in soldiers notes, and gave his note for the balance, being £57-5-5 payable on demand, and took up said note for £300— that on the 30th of March A. D. 1790, the plaintiff demanded the whole of said sums in the note for £23-11 in certificates, and the one for £16-16-9 in specie, and the 20*s* per month interest on said £200 deducting the payments which had been made, and it was then and there corruptly agreed between the plaintiff and the defendant that the defendant should execute the note on which, &c. for the aforesaid considerations and no other ; and in pursuance of said corrupt agreement the defendant gave the note on which, &c. and that there was in fact included in and secured by it £50 for loan, interest and forbearance over the lawful interest at six per cent. per annum.

The plaintiff replied, that on the 30th of March A. D. 1790, the whole of the note for £23-11 in certificates, and the interest was due, and the whole of the note for £16-16-9 specie, except 18*s* paid thereon. The whole of the interest of said £200 at 20*s* per month, from July A. D. 1787, and 5*s* for boot money in the exchange of oxen, all which amounted to more than the sum of the note on which, &c. and is the consideration for which it was given, and that he ought not to be barred ; without that, there is included and secured by the note on which, &c. the sum of £50, or any sum over the lawful interest at the rate of six per cent. per annum, for forbearance, by

liability for the maintenance of said child, and received the reward of his iniquity ; then went off and left her ; and all by the instigation and procurement of the defendant.

John Calder and Wife *vers.* Caleb Bull.

A widow's dower is paramount to the right of the heirs or creditors, before assigned and set out to her.

ACTION of ejectment for certain lands described in the declaration of which the plaintiffs were seized in right of the wife—Plea in bar that Mrs. Bull, the wife of the defendant, was the widow and relict of Normand Morrison, late of Hartford, deceased, who in his life time and at the time of his decease, was seized in fee simple of the demanded premises in his own right ; and upon his death, without a will, she being his wife, became entitled to the use and improvement of one third part of said demanded premises, during her natural life, for her dower ; and that the defendant had been in possession of said premises in her right, lying in common and undivided, as he had good right to be, the same having never been assigned to her or set out in severalty.

The plaintiffs replied, that Mrs. Bull was appointed administratrix on the estate of said Normand, and obtained an order for the assignment of dower to her, but both she and the defendant had ever neglected to have said dower assigned and set out to her, and until that was done she had no right of dower to possess the same in common with the plaintiffs.

To this reply the defendant demurred.

By the court—The question of law in this case is, whether the widow has immediately upon the death of her husband, a right to the possession and occupancy of her thirds, lying in common with the heirs ? Or whether she has only a right to have her dower assigned to her, and till that is done, hath no right to enter and occupy ? Or in other words, does the whole real estate of the intestate upon his death descend and vest in the heirs at law ; out of which her dower is to be carved and assigned to her, or does her right of

dower and of entering and possessing, descend and accrue immediately upon the death of the husband, and before any distribution or assignment of dower is made?—This cause was continued to advise, and at the superior court holden at Hartford in February A. D. 1794, judgment was rendered that the reply of the plaintiffs was insufficient. The statute respecting dower, is “That every married woman living with
 “ her husband in this state, or absent elsewhere from
 “ him with his consent, or through his default, or
 “ by inevitable providence, or in case of divorce,
 “ where she is the innocent party, that shall not
 “ before marriage be estated by way of jointure, &c.
 “ in lieu thereof, shall immediately upon and after the
 “ death of her husband, have right, title and interest,
 “ by way of dower, in and unto one third part of the
 “ real estate of her said deceased husband, in houses
 “ and land, which he stood possessed of in his own
 “ right at the time of his decease, to be to her during
 “ her natural life ; the remainder of the estate shall be
 “ disposed of according to the will, and if there is no
 “ will, according to law.”

The statute for the distribution of estates, is as follows—“ That the courts of probate, shall and are empowered to order, and make a just division and distribution of all the estate both real and personal of
 “ any intestate, which shall remain after deducting
 “ debts and charges, in manner following, viz. One
 “ third part of the personal estate to the wife of the
 “ intestate (if any there be) forever ; besides her dower or thirds in the houses and land, during life ;
 “ where such wife shall not otherwise be endowed ;
 “ and all the residue and remainder of the real and
 “ personal estate by equal portions to and among
 “ the children and those who legally represent them,
 “ &c.”

The law respecting the settlement of insolvent estates, is expressed, that the judge of probate shall order the widow's dower first to be set out according to law ; and the residue and remainder of said estate both real and personal, with that assigned to her for

dower, under the incumbrance of her holding it for life, the judge shall order the executor or administrator to sell, &c.

By these laws the widow's dower is preferred to heirs or creditors ; the laws of a country or state, determine, where there is no will, to whom a man's estate shall go upon his decease ; and our law is express, that the wife shall immediately upon and after her husband's death, have right, title and interest, by way of dower in and unto one third part of the real estate of her said husband, &c. that there is no room left for a doubt as to her right. The law points out a method how dower shall be assigned and set out to her, and the time in which it is the duty of the heirs to do it, and also her remedy in case it is not done ; but this doth not affect her right, it is only prescribing a method for apportioning to her to hold in severalty what she had a right to possess in common.

This judgment was affirmed upon a writ of error in the supreme court of errors.

Stanly *vers.* Duhurst.

A bankrupt may after assigning his property to commissioners have an action for a tort committed before.

ACTION of the case declaring that in A. D. 1789, the plaintiff held a note against him of about £600, which was nearly paid : and to vex and distress the plaintiff, the defendant prayed out an attachment against him on said note to attach his goods to the amount of £450, and did attach his goods to a very large amount, and took them away and detained them from him until 1792, although he offered him good security for the debt, which was due ; whereby he lost the sale of said goods and many of them were greatly damaged and hurt, when very little or nothing was due on said note.

Plea in abatement, that upon application of the plaintiff made to the general assembly in May last, for an act of insolvency to be passed in his favour, said assembly enacted and resolved, that upon his resigning up all his estate for the benefit of his creditors, he

should thereafter be protected from arrest and imprisonment, for and on account of any debt before that time made and contracted; that he had accordingly resigned all his estate, interest and debts, into the hands of commissioners, for that purpose appointed, and by law he had no right to have and maintain this action; the cause of which accrued before the passing of said act of insolvency.

To this plea the plaintiff demurred, and judgment that the plea was insufficient.

By the court—This action is founded in tort and not on contract, and was not transferred by said assignment.

Barns vers. Finch.

ACTION on note dated the 22d of December, A. D. 1788, for £32, to be paid in joiner's work, only, within two years from the date.

In an action on a note for joiners work, the plaintiff will be barred, if the defendant tenders performance and the plaintiff neglects to provide the work.

Plea in bar that in December A. D. 1788, he applied to the plaintiff for his directions respecting his performing said work, and offered and tendered to perform said work to the full amount of said note, as fast as it could be done; and ever since had stood ready to perform said work, but the plaintiff had never provided any work for him to do, nor given him any directions concerning the same. Which plea was traversed by the plaintiff. Issue to the jury. The jury found a verdict for the defendant in the terms of the plea.

The only question of law in this case was, whether the defendant had not done all that he could do, in order to pay his note? And whether the plaintiff's neglecting to provide work for him, was not a sufficient excuse and justification for his not having performed it. The court were of opinion with the jury that it was, and that this was the genuine meaning and intention of the parties in the contract.

Windham County, September Term, A. D. 1793.

Ebenezer Bundy *vers.* Peter Sabin.

A question about the title to a highway, not within the jurisdiction of a justice to try.

WRIT of error to reverse a judgment of a justice of the peace in an action of trespass brought by Sabin against Bundy; declaring that on the 1st of May inst. he was, and long before had been seized and possessed in fee simple of about 84 acres of land, called the Joseph Marcy lot, adjoining on the south side upon an old pathway, leading from the defendant's house westerly through lots, into the highway leading to Woodstock, and is bounded west on Abel Alton's land, &c. which lot was well inclosed with fence; that the defendant on the 1st of said May and on divers other days did without law and right break down the bars and fence of the plaintiff inclosing said lot, and let his cattle out of his pasture to his damage 40/. Writ dated 24th May, A. D. 1793.

The defendant plead in bar, that in A. D. 1738, when the plaintiff's said lot of land was surveyed and laid out, there was laid out a public highway leading by said lot, north of said Abel Alton's, eastwardly to Quinabog river, four rods wide, on which the plaintiff's lot is bounded; and that said highway had been improved for a highway for more than fifty years; and the plaintiff about two months before the date of his writ did without right erect a fence across said four rods highway, to the annoyance of travelling; and the defendant having occasion to travel in said road, pulled down said fence erected thereon by the plaintiff as aforesaid, as well he might, and which was the same and all the trespass in the declaration complained of.

The plaintiff replied and traversed there having been any such highway laid out, and its having been improved for a highway, and the plaintiff's lot bounding upon it; and also his having erected a fence thereon to the annoyance of travelling as the defendant in his plea had alledged.

The defendant rejoined and affirmed his plea ; on which the parties were at issue. The defendant moved, that as the title of the highway was put in issue, the justice could not try it ; and offered bonds agreeably to the statute to remove the cause to the county court, and the justice refused to grant his motion.—The defendant then offered copies from the proprietors' records to prove that said highway of four rods was laid out ; also, evidence to prove that it had been improved for a highway more than fifty years ; both which the justice refused to admit ; and proceeded and gave judgment, that there was not in A. D. 1738, any highway laid out there, nor had it ever been improved for a highway, &c. &c. and for the plaintiff to recover 15/ damages and his cost.—Upon which the defendant filed a bill of exceptions, which was allowed.

Errors assigned—1st, That the title of said highway was put in issue by the pleadings, and the justice had no right to try it—2d, That said justice ought to have admitted the proprietors' records to prove the laying out of said highway, and also the evidence to prove that it had been used as such.

Judgment—Manifest error in both points assigned for error. For the justice had no right to try the title to the highway, but if he did he ought to have admitted the evidence both of the title and the use of it, as a highway.

Jareb Dyer *vers.* John Girard.

ACTION of debt by book demanding £40. Plea in bar, that having prayed oyer of the plaintiff's book, it consisted of the following charges, viz. 174 barrels of beef at 36/ per barrel, and 42 barrels and a half at 18/ per barrel ; which beef the plaintiff was to deliver well packed and inspected, upon a contract ; and that the defendant got said beef repacked and inspected at New-London, and it fell short eight barrels in weight ; which with the cost of repacking, inspecting and salt, amounted to £24-18-11 lawful

A clerk's receipt shall conclude his principal for no more than he received.

money, and the plaintiff having received a part of the pay, gave an order to Willoughby, his clerk, in the words following, viz. Mr. Girard, please to send me the balance due for the beef sold you, and this shall be your receipt for the same—Jareb Dyer.— Upon which he paid the balance to said Willoughby, and said clerk endorsed on said order, November 3d, 1792, Received on the within order 686 dollars and 5/2, being the balance—per R. Willoughby. And thereupon he says, that he hath settled and paid the plaintiff in full for said beef and is therefrom exonerated.

The plaintiff replied, that said beef was well put up at Canterbury, well packed and inspected, and delivered according to said contract; and he ought not to be barred, without that that the defendant had settled and paid the plaintiff in full for said beef and is therefrom exonerated. Upon which the parties were at issue to the jury. The question was, whether Willoughby's receipt was a receipt in full; and whether he had right to settle for less than the whole sum the beef amounted to; for the defendant had kept back the sum of £24-18-11 out of the price of the beef. The plaintiff offered Willoughby to prove that he had no orders from him to make any settlement; but he was not admitted to swear any thing, which might contradict his receipt. The plaintiff then offered proof, that he gave Willoughby parol orders, not to settle; and this proof was not admitted; as the written order was what the defendant had to act upon, if that conveyed a power to Willoughby to settle, he had it; if not, then there was no settlement, and this must depend upon the construction of the written order given. The jury found a verdict for the plaintiff, and £24-18-11 damages, which was accepted by the court. It is clear, that Willoughby's receipt upon the order, is conclusive upon the plaintiff to the amount of what he received, but no further; for it contained no authority to settle and discharge the debt for any less sum than the whole price of the beef.

New-London County, Sept. Term, A. D. 1793.

John Livingston, administrator of John Livingston, deceased, *vers.* — Abel.

ACTION of debt on a judgment recovered by said John Livingston, deceased, in his life time.

A plaintiff may admit his writ shall abate, and amend on paying the cost.

On the second day of the court to which this action was brought, the plaintiff by a written motion, stated to the court, that the plaintiff was mis-described; that the plaintiff's christian name was Catharine, and not John, and that she was executrix of the last will and testament of said John Livingston, deceased, and admitted that her writ ought to abate, and prayed liberty to amend on paying cost, and to insert in the writ Catharine, in the place of John; and instead of administrator to insert executrix of the last will of the said John, deceased. The county court refused to grant liberty to amend, and the plaintiff appealed to this court; and this court granted to the plaintiff liberty to amend her writ as moved for upon paying the cost, which was accordingly done. A question then arose whether the cost should be paid up to this time, or only to the time it was tendered in the county court, for the plaintiff then agreed, that her writ should abate and tendered the cost, and the only question was whether she might amend. By the court—The cost must be paid up to this time; it being a doubtful question whether she might amend or not; and being now settled for the first time.

The defendant then plead in abatement that said writ as amended had never been served on the defendant, by giving him twelve days notice—demurrer.

Judgment—That the plea in abatement is insufficient; in all cases where the law admits of an amendment, it considers it to be the same action, amended; and of this the defendant has had sufficient notice in court; and also compensation by receiving the cost. This is not different from the common cases where the

defendant had plead the same things in abatement, and the court had abated the writ ; for on payment of cost, the plaintiff might have amended it ; the plaintiff admitting her writ to abate doth not alter this case.

James Rogers *vers.* William Moor.

Articles omitted by mistake in a settlement, may not be recovered in an action of book debt.

ACTION of book debt—Plea—owe nothing. Issue to the jury.

The plaintiff produced his book which contained no articles charged after the 7th of November 1791. The defendant then produced and read a note given by the plaintiff to the defendant, in the words following, viz. November 7th A. D. 1791, for value received I promise to pay to William Moor, the sum of seven pounds lawful money, it being for balance on settlement of accounts, James Rogers.—And stated, that at this time there was a settlement of all antecedent accounts ; and objected against any articles charged and delivered previous to that time, being exhibited to the jury.

The plaintiff did not object against the note's being read in evidence under this issue ; nor deny but that there had been a settlement, but said, that there were sundry articles in his account, which at the time of settling were not brought in and allowed, because the defendant affirmed that he had paid the plaintiff's father for them ; but he had since found that the defendant deceived him, and that he had not paid his father for said articles, and this he offered to prove.

By the court—As the settlement is admitted and the plaintiff's claim is only for mistakes made in the settlement, this action is improper, and the plaintiff must resort to his proper action, grounded on said mistakes—upon which the plaintiff withdrew his action. Kirby's reports, Punderfon *vs.* Shaw, 150—Root's reports, State *vs.* Lawrence, 397.

Bowers vers. Dunn.

ACTION of debt by book—Plea owe nothing. Issue to the court. The plaintiff's book was for one half of certain expenditures in making repairs on a vessel, of which the plaintiff and defendant were joint owners, and for their joint benefit; the defendant contended that this action did not lie in such case, but an action of account; but the court were of opinion that the action was proper, and gave judgment that the defendant did owe by book, &c. and for the plaintiff to recover.

Action on book lies for one half of expenditures made for the joint benefit of both plaintiff and defendant.

Jacob Watson vers. Hart and Perkins, administrators of Erastus Backus.

APPEAL from probate. The appeal was taken from the following orders and decrees of the court of probate, viz.

One appeal from probate cannot embrace several distinct orders of probate.

An order opening the commission of commissioners on the estate of said Erastus, it being insolvent, upon the application of Jonathan Pierce, after it had been once opened and closed, and after the first limitation had expired, in order to give said Jonathan Pierce an opportunity to exhibit his claim against said estate—

An order for the administrators to pay said Pierce £15 in full of a claim for the avails of certain saddles sent by John Huntington, on freight, when he went in a vessel of said Backus's, the avails of which were sent back with other property of his to said administrators and by them inventoried as said Backus's estate—

And for refusing to give an order to the administrators to pay him, said Watson £30, due him by note, which was secured by a mortgage from said Backus, and by said Watson had been given up to said administrators.

NEW-LONDON COUNTY,

Upon which appeal, said Watson gave a bond to the administrators only, conditioned to prosecute his appeal, &c.

The appellees plead in abatement of the appeal, that the appellant had joined several matters in his appeal which were distinct in their nature and by law could not be joined in one appeal.—2d, That the bond was taken to the administrators only, when said Pierce was a party in interest.

By the court.—The plea in abatement is sufficient; because the decrees are several in their nature, and affect different parties in interest, so that they cannot be embraced in one appeal; and said bond is taken only to said administrators, whereas Pierce is a party as to the order for opening the commission.

Hurlbut, &c. *vers.* James Rogers.

A cause not appealable in the county court, cannot be made so by increasing the damages in the superior court.

ACTION of trespass for taking and carrying away 200 loads of sea weed from a certain farm of the plaintiff's, containing eighty acres, demanding £14 damages.

The defendant plead not guilty. Issue to the jury.

Upon reading the declaration, the court observed that the cause was not appealable; the damages demanded being but £14.

The parties agreed and moved the court to amend the declaration by increasing the sum demanded in damages to £24.

By the Court.—The cause not being appealable in the county court, nothing the parties can do can sustain it in this court.

Chauncey Bulkley, &c. Executors of Oliver Bulkley *vers.* Clark.

Assumpsit will lie in favor of a collector a-

WRIT of error to reverse a judgment of a justice in an action of indebitatus assumpsit,



brought by said Clark vs. said Executors, for money paid for the use of said Oliver and the defendants, declaring that he was collector of taxes in A. D. 1769, 1770, 1771, and in 1772; that said Oliver was charged in his tax bills £1-3-1 which he never paid; that in A. D. 1781 he died, which sum the defendants had never paid since his decease; and that the plaintiff had been obliged to pay said sum due for taxes and the interest, which he did for the use of the defendants, they having sufficient effects in their hands to pay all said Oliver's debts; that thereupon the defendants became liable in their said capacity to pay said sum and interest, and did in consideration thereof assume and promise.

gainst an administrator for taxes due from the intestate.

Plea—non assumpsit. The evidence being introduced on the part of the plaintiff and on the part of the defendants, the defendants demurred to the evidence, and moved the court that the plaintiff should be compelled to join in the demurrer to the evidence, which the justice refused to order. The defendants then moved for liberty to alter their plea, and to plead the statute against frauds and perjuries, in bar of the action; this also the justice denied; and proceeded and gave judgment that the defendants did assume and promise and for the plaintiff to recover £1-14 damages and cost.

Errors assigned were—1st, That the declaration was insufficient—2d, That the justice ought to have compelled the plaintiff to have joined in the demurrer to the evidence—3d, That the justice refused to sign a bill of exceptions tendered on that account—and 4th, That the justice would not allow the defendants' attorney to except against the declaration.

The defendant in error plead in abatement, that errors in fact and errors in law were joined in said writ, which by law may not be done.

Judgment—Plea in abatement insufficient; the errors in fact being immaterial. The plaintiff then struck out of the writ the errors in fact; and the defendants plead nothing erroneous; and the judgment

of the court was, that there was nothing erroneous in the judgment complained of.

By the court—This action is an action of assumpsit for so much money, which the plaintiff has been obliged to advance and pay for the defendants and which they ought to refund to him. No party is compellable to join in a demurrer to parol evidence; and there seems to be no sense in demurring to the evidence, in a case, where the issue is joined to the court, who are in such case judges of law as well as of fact; and the defendants might have availed themselves of the statute against frauds and perjuries under the issue of non assumpsit, if their case came within it.—*Vide* *Eno vs. Roberts*, Kirby's Rep. 398.

State verf. Daniel Wilfon a Negro.

Upon an information for a high misdemeanor at common law, the court may imprison in Newgate.

INFORMATION at common law for a high misdemeanor and breach of the peace, for threatening to kill and murder Mrs. Wheat and the family of Capt. Wheat, when he was from home, and actually stabbing one John Gordon and for other outrageous conduct; of which he was convicted and sentenced to Newgate prison for eighteen months, as a common law punishment.

This point was settled and adjudged at Hartford, superior court September term, A.D. 1790, on an information of the State's attorney *vs.* William Steel, brought at common law for a high misdemeanor.

On this information Steel was found guilty by the jury, and the court gave sentence against him that he should be confined in Newgate prison eighteen months, there to be kept to hard labor. This judgment was afterwards affirmed in the supreme court of errors.

Wolcott verf. Noah Day.

Chancery will relieve against

WRIT of error to reverse a decree in chancery of the county court, on a petition preferred



by Wolcott against Day, shewing that they had a controversy about a final settlement note, which they agreed and left to arbitration, and the arbitrators awarded the petitioner to pay said Day £18-10 which sum said Noah by his attorney John Day had recovered judgment and execution for and cost; that since said arbitration and said judgment, he had found a discharge under the hand of said Noah given before said arbitration, which discharged him from all demands, and included said final settlement note, which at the time of said arbitration was lost, mislaid, and wholly out of his power to produce; and which discharge he had shewn to said Noah Day, and by him was recognized to be genuine; and he said Noah had in consequence thereof given orders to John Day his attorney, not to pursue said execution; yet said John Day refused to obey said orders, and was pressing him with said execution—praying to be relieved against said judgment and execution. Plea in abatement—that the petition did not contain sufficient grounds for relief in chancery. Judgment of the county court—That the plea was sufficient and that the petition abate.

an execution for a debt which was discharged, and the debtor prevented by accident from producing the discharge in season.

Error assigned, was—That said county court ought to have judged said plea in abatement insufficient.

Plea—nothing erroneous. Judgment—manifest error.

By the court—There cannot be a clearer case, than that stated in the petition: the petitioner was pressed with an execution for a debt from which he had a discharge, which by accident he was prevented from producing at the arbitration, and which the creditor acknowledged to be genuine, and had given orders to his attorney to stay proceeding against him; and that the attorney obstinately refused to obey said orders.

William Potter *vers.* Thomas Allin, Finch, &c.
of the city of London.

ACTION of debt by book. The defendants prayed oyer of the book, and recited it, which

A citizen of this state may sue a

subject of Great Britain on a contract made in England. An alteration of the voyage excuses the mariners for leaving the vessel.

contained a charge for wages as a seaman on board the ship *Hebe*, from London in Great-Britain to Antigua, and from thence to New-London ; and thereupon they defend, plead, and say, that the plaintiff of his action ought to be barred ; because they say, that on the 29th day of October A. D. 1789, the defendants and the plaintiff were all subjects of the king and kingdom of Great-Britain, and under allegiance to said king, and never were citizens or subjects of, or resident in any of the United States, nor under allegiance to them or either of them ; and that the defendants had ever since resided in Great-Britain, and there had a plentiful estate to satisfy all their debts ; and that the charges in said account were for wages earned on board the ship *Hebe*, in consequence of the plaintiff's entering into a certain written agreement contained in a portage bill, in the city of London in Great-Britain ; which is as follows, viz. from London to St. John's in Antigua, from thence to Jamaica or America, from thence to London, or to some port in Great-Britain or islands—that said ship sailed on her voyage from London to St. John's in Antigua, and thence proceeded therein to New-London in America, at which port last aforesaid the plaintiff on the 15th of October A. D. 1790, deserted from said ship ; and soon after said ship proceeded from said port of New-London to the island of Jamaica, whither she was bound.

The plaintiff replied, that the defendants ordered a deviation from the voyage for which he shipped, and thereby broke their contract with him ; that he had married a wife at said New-London, and had become a citizen of the state of Connecticut, and an inhabitant of the town of New-London, and that said ship after her sailing from said island of Antigua proceeded to the island of Jamaica, in the course of the defendants' business, and by their direction to New-London in America, which was a deviation and a breach of the contract on the part of the defendants ; and he left said ship as well he might, without that that the plaintiff was a subject of the king of Great-



Britain, and without that that the plaintiff deserted from said ship.

The defendants affirmed over, that the plaintiff was a subject of Great-Britain, and that he did desert from said ship in the port of New-London, as alledged in his plea in bar ; the plaintiff demurred to the defendants rejoinder.

By the court—Two questions arise upon these pleadings—1st, whether this court has jurisdiction of this cause, as the contract was made in a foreign jurisdiction, when both parties were subjects of that jurisdiction, and the defendants still are, whatever the plaintiff may be—2d, admitting that the court hath jurisdiction, whether, upon these pleadings the plaintiff is entitled to recover.

The question of jurisdiction, is to be considered in three points of light ; as it respects the plaintiff, as it respects the defendants, and as it respects the place where the cause of action arose.

As to the first point under the question of jurisdiction, the defendants have alledged in their plea in bar, that on the 29th of October A. D. 1789, the plaintiff and defendants were all subjects of the king and kingdom of Great-Britain and under allegiance to said king ; that they never were citizens or subjects of, nor resident in any of the United States, nor under allegiance to them or either of them ; and that the defendants have ever since resided in Great-Britain, and there have sufficient estate to pay all their debts ; and that the plaintiff on the 15th of October A. D. 1790, at New-London, deserted from said ship—none of these allegations except the plaintiff's deserting said ship being traversed or denied are admitted.

The plaintiff in his reply, says, that he left said ship at said New-London on the 15th of October A. D. 1790, and that he had become a citizen of the state of Connecticut, had married a wife in said New-

London and become an inhabitant of said town, and that he ought not to be barred without that that he was a subject of the king of Great-Britain and deserted from said ship at said New-London—The first fact traversed, is no where alledged in the plea unless it be necessarily implied, in the plaintiff's being a subject of Great-Britain on the 29th of October A. D. 1789—The second point traversed is an inference of law from the facts disclosed in the pleadings, for it is agreed by both, that the plaintiff left the ship on said 15th of October.

The defendants rejoin and say that the plaintiff is a subject of Great-Britain, and that he did desert the ship at said New-London on said 15th day of October A. D. 1790—The traverse being immaterial makes no alteration in the state of the facts disclosed in the pleadings, which are, that on the 29th of October A. D. 1789, the plaintiff and defendants were all subjects of the king of Great-Britain ; and that they never were citizens of, nor resident in any of the United States, nor owed allegiance to them, &c. which must relate to the time before the 29th of October A. D. 1789, for the words are, never were ; had the words been that on the 29th of October A. D. 1789, they were subjects of the king of Great-Britain, and that they never were, are not, nor have been citizens or subjects of the United States, or either of them, it would have included the plaintiff, and covered all the time up to the time of the plea, and must have been answered ; and it is expressly alledged, that the plaintiff had become a citizen of the state of Connecticut, and an inhabitant of the town of New-London, which is not denied ; he had right, of consequence, to maintain an action at law here ; but be this as it may, a subject of the king of Great-Britain, who is in amity with the United States, hath right to maintain personal actions in this state.

The second point which respects the defendants, is rather more doubtful ; although it be true, that criminals who flee from the laws of their country into a foreign jurisdiction to escape punishment ; and debt-

ors to avoid the just demands of their creditors, are according to existing laws and usages, there screened and protected by such jurisdiction, from the demands of justice, as they must be, without the aid of such jurisdiction to take or prosecute them; yet it is a practice except in the case of an alien enemy, highly derogatory to any government in a civilized country.

Great doubts arose in the minds of some of the judges upon this point, but the court got over them, upon the ground that the plaintiff had right to prosecute an action for the recovery of his dues in this state; that actions of this nature had been sustained against foreigners, where their persons or properties had been attached and holden—that the evidence of the facts, and also of the law, under which the contract was made, may be produced and certified to the court here, and substantial justice be done between the parties.

As to the third point, under the head of jurisdiction, viz. that which arises from the place where said contract was entered into and the cause of action arose.

The court considered this as a personal right in the plaintiff, and transitory where ever he went, and that there was nothing in this objection to oust the court of jurisdiction.

With respect to the second general question, which was, whether admitting the court to have jurisdiction the plaintiff upon the pleadings was entitled to recover.

The contract is in writing, and there is no dispute with respect to it; the plaintiff agreed to go a voyage in the ship *Hebe*, as a mariner, from London in Great-Britain, to Antigua in the West-Indies; from thence to Jamaica or America, from thence to London or some port in Great-Britain or the Islands—by Islands must be understood, Islands of Great-Britain, lying near or adjacent to that kingdom—and from Antigua to Jamaica, or America, is in the disjunctive, to one or the other, but not to both; from Antigua

they failed to New-London in America, and from thence to Jamaica. At New-London the defendants altered the voyage and ordered a deviation, which was to go to Jamaica, and the plaintiff left the ship, which he had good right to do—and if it be considered that the ship failed first from Antigua to Jamaica, and from thence to New-London in America, the case would be stronger in favour of the plaintiff, and the defendants breaking their contract the plaintiff became released from his obligation to remain on board said ship, and entitled to his wages up to that time, to be paid him at the place of discharge.

Judgment—Rejoinder of the defendants insufficient and for the plaintiff to recover.

Middlesex County, December Term, A. D. 1793.

Ruffel vers. Cornwell.

The issue put
must be directly
answered by
the court or
jury.

ERROR to reverse a decree in chancery of the county court, on a petition brought by said Ruffel against said Cornwell, shewing that said Cornwell, on the 20th of Dec. A. D. 1770, made and executed his note to Nehemiah Higby, for six pounds lawful money, payable on demand with interest; that on the 15th of December A. D. 1772, said Higby, for a valuable consideration assigned said note to the petitioner; and on the 1st of January A. D. 1789, the petitioner gave notice to said Cornwell of said assignment, and demanded payment, said Higby being a bankrupt; that he sued said note to November county court A. D. 1789, and said action was continued to April court A. D. 1790, when said Cornwell produced and plead a discharge of said note from said Higby, in bar of said action, dated the 13th of April A. D. 1790, whereby the petitioner was debarred from recovering on said note, and subjected to a large bill of cost, although no part of said note had ever been paid—and

prayed that said Cornwell be ordered to pay said note to the petitioner.

Plea in abatement—That said petition and the matters therein contained were not sufficient to grant any relief to the petitioner. Upon which the county court gave judgment—that said petition be negatived.

Errors assigned—1st, That said petition was sufficient and ought so to have been adjudged—2d, That the court had not answered the issue put to them.

Judgment—Manifest error. Every issue in law or fact joined by the parties and put to the court, must be answered directly; which was not done in this case. Root's reports, *Smith vs. Bellamy*, 200—*Gates vs. Nobles*, 344—and *Woodworth vs. Clark*, 542.

Samuel French, jun. *vers.* Zacheus Lyon.

PETITION in chancery, shewing that the petitioner gave a clear deed of about four acres of land, worth £150, to said Lyon, dated the 16th of April A. D. 1789, for the security of a debt he owed said Lyon of £60—That he took back from said Lyon at the same time a written defeazance, wherein said Lyon engaged that upon his paying him £60 by the first of April then next, and interest, that he would release said land back to him; that afterwards the petitioner was attached for a debt by the instigation of said Lyon, and the petitioner applied to said Lyon to give bail for him, and he refused, unless the petitioner would give up said defeazance, which he did; that thereupon said Lyon claimed to hold said estate absolutely, unless he would give him ten per cent. interest on said debt, and instead of returning said original defeazance, after he was completely indemnified on account of his giving bail, he gave him another writing purporting to be a defeazance, upon the petitioner paying other and further large sums to the amount of £142 when only £60 and interest was due—and that said Lyon had commenced a suit against him for the land, and praying for a dis-

An absolute deed, with a written agreement to reconvey on paying the debt, is a mortgage.

see p. 122 of this book

covery from the respondent and for relief. The respondent being put upon oath, and said deed produced, and also the defeazance by the petitionee, which was in the words following, viz. This certifies that I have agreed with Samuel French, jun. that if said French pays me £63-12 lawful money, by the first of April next, then I promise to give him back a deed of said land—Dated 16th of April A. D. 1789.

The court, on hearing the petition on the merits, found the facts alledged to be true, and adjudged said estate to be redeemable—and ordered and directed that the petitioner have liberty to redeem said estate upon his paying the principal of said debt, and the interest, by the 1st of February then next.

Chauncey Bulkley *vers.* Wright and Little, executors of Noah Bulkley.

Upon a joint and several obligation, the obligee hath remedy against either of the obligors or their executors.

PETITION in chancery, shewing that in March A. D. 1775, the petitioner and said Noah and Oliver Bulkley were in partnership in trade; that they dissolved their partnership, and entered into written articles of agreement that the petitioner should pay all the company debts; and if they exceeded £350 said Oliver and Noah, jointly and severally, promised to pay two thirds of what the company debts should exceed said £350. That said Noah died in A. D. 1776, leaving a plentiful estate, a will, and the respondents his executors; that said Oliver died in A. D. 1778, leaving a will, the petitioner and Joseph Bulkley his executors, but no estate. That the company debts amounted to £906-10-2 lawful money, which exceeded said £350 the sum of £556-10-2, one third of which amounted to £185-10, which was said Noah's part to pay, and which neither he nor his executors had ever paid, and being without remedy at law prayed that the respondents be ordered to pay.

The respondents plead in abatement, that the petitioner had adequate remedy at law.

Judgment—that the plea in abatement was sufficient. For the engagement set forth in the petition is said to be joint and several between said Oliver and Noah; if so, either of them or their executors may be sued severally, and Oliver surviving Noah, will be no impediment at law.

The petitioner moved to amend his petition by striking out "*severally*," which was allowed on payment of cost. It being evidently a mistake, for the petitioner had brought an action at law upon the same agreement against the respondents, declaring upon it as joint, and failed because his remedy was in chancery only; he now seeks his remedy in chancery and fails because he has described the agreement to be several as well as joint.

Starr vers. Goodwin.

WRIT of error to reverse a judgment of the county court in an action of trover for a vessel's boat, brought by Goodwin against Starr. The defendant by agreement plead specially that said Goodwin in A. D. 1788, built the schooner Abiah, that he also built said boat to go in her and for her use, that it had been with said schooner in all her voyages, and is the only boat belonging to said schooner; that said Goodwin gave a bill of sale of said schooner, with her tackle, apparel, furniture, and appurtenances, to Mr. Alsop, who sold her to said Starr, and by force of said bill of sale said boat passed. The plaintiff demurred to this plea, and the question was whether the boat passed by the bill of sale, under the description of appurtenances; the county court judged that the boat did not pass and gave judgment that the plea in bar was insufficient and for the plaintiff to recover.

In a bill of sale of a vessel, with its appurtenances, the boat does not pass.

Error assigned—that said county court ought to have judged said plea in bar sufficient.

By the court—There is nothing erroneous in the judgment complained of—This judgment was affirmed by the supreme court of errors in June A. D. 1794.



*New-Haven County, January Term, A. D. 1794.**Law vers. Atwater, &c.*

In an action
for a rescue on
mean process
the plaintiff
must prove his
debt.

ACTION for rescuing Abiather Hull, whom the plaintiff had caused to be attached on a note given to him by said Abiather, dated the 15th of October A. D. 1792, for 100 dollars, payable on demand, with lawful interest; whereby he had lost his debt, &c.

Plea—not guilty—Issue to the jury. The plaintiff did not pursue his action upon the note, and had recovered no judgment against said Hull. The defendants objected against the plaintiff's producing any evidence to prove his damages, as this was upon mean process, and no judgment had been recovered.

By the court—The plaintiff may produce his note and prove his damages—The plaintiff produced said note which had subscribing witnesses; and the defendants denied that said Hull ever executed said note, and the subscribing witnesses not being present in court, the plaintiff offered to prove the execution of said note by comparison of the hand writing, but was not permitted to do it, as there were witnesses to the note. The plaintiff then offered evidence to prove that said Abiather had acknowledged that he signed the note—this being objected against, that although it would be good evidence against said Hull himself, yet it is no evidence against the defendants to conclude them—and the evidence not being admitted the plaintiff was non-suited.

Edward Tyler vers. Atwater, Hull, &c.

Attachments
as well as sum-
monses may be
directed to in-
different per-
sons to serve.

ACTION of trespass for an assault and battery committed upon the plaintiff. Plea not guilty. Issue to the jury.

The case was—A. Law prayed out a writ of attachment against Abiather Hull, one of the defendants

and had it directed by the justice to the plaintiff to serve, as an indifferent person, there being no proper officer to be had; and the plaintiff undertook to serve said attachment on the body of said Hull, which occasioned the resistance, assault and battery complained of. One point made in the case was, that a justice of the peace had no right or authority to direct an attachment to an indifferent person to serve in any case. The jury found a verdict for the plaintiff.

By the court—The law in the terms of it, makes no distinction between summonses and attachments in this respect, and it has been long settled in practice, for justices to direct attachments as well as summonses to indifferent persons to serve, and in consequence thereof they must have a right to command assistance, and to take bail, and to do whatever a proper officer might do in those cases.

Stephen Brunson *vers.* Ezekiel Brunson.

ACTION of the case, declaring, that the defendant in and by a certain writing or receipt, under his hand, and by him executed, dated the 14th of November 1785, acknowledged that he had borrowed of the plaintiff to the amount of £49-15-6 1-2 in state notes; and that the defendant had never paid said state notes, although often requested, &c.

A declaration must set forth a contract and not merely the evidence of one.

A demurrer was given to this declaration, under which demurrer the following exceptions were taken—1st, That it was not stated what said notes were worth in lawful money—2d, That there was no contract set forth or alledged, in the declaration, only evidence of a contract, viz. a receipt in which the defendant acknowledged that he had borrowed said notes—3d, That no breach of contract was sufficiently assigned.

By the court—The declaration is insufficient; for there is no averment that the defendant did borrow

FAIRFIELD COUNTY,

said notes, only that there is a receipt by which he acknowledged that he had borrowed them—which is only an averment that there was evidence of his having borrowed them. A person's borrowing money or notes is a good consideration of a promise to pay, either express or implied; but the declaration must set forth a promise to pay, according to the operation of law upon the facts, or it will be bad upon a demurrer.

Fairfield County, January Term, A. D. 1794-

Nathaniel Seely and the Inhabitants of North Stratford, legatees under the last will and testament of Samuel Staples, *vers.* the Executor of said Staples.

An appeal must be taken from each particular decree of probate within eighteen months from passing them.

APPEAL from probate. The appeal was taken on the 1st of January A. D. 1794, from the following orders of said court of probate, viz. from an allowance made to the executor of said Staples, in his account on the 16th of February A. D. 1789, of £634-2-2; and on the 25th of same February a further sum of £218-11-9; and on the 28th of March A. D. 1791, of a further sum of £79-10-1; and on the 15th of November A. D. 1793, of a further sum of £23-7-8, and for sundry other allowances up to the 12th of December A. D. 1793.

The appellee plead in abatement that the orders of probate made on the 16th and 25th of February A. D. 1789, and on the 28th of March A. D. 1791, were made and passed more than eighteen months before the 1st of January A. D. 1794, when said appeal was taken.

The appellants replied, that said allowance of £634-2-2, and of £218-11-9, and of £79-10-1 with said £23-7-8, and all after allowances up to the 12th

of December A. D. 1793, made to said executor, were only so many articles allowed, which made and composed the general account of said executor, and which was finally settled and closed on the 12th of December A. D. 1793, within eighteen months of the time said appeal was taken—To this reply the appellee demurred—and judgment that the reply was insufficient, and that the appeal abate as to all those decrees excepted to in the plea of abatement.

Thomas Belding and the Inhabitants of the town of Norwalk, *vers.* Mary Silliman, administratrix of Gold S. Silliman, Esq. deceased.

WRIT of error to reverse a decree in chancery of the county court, on a petition brought by the plaintiffs in error against said administratrix; shewing that in the course of the war said Gold S. Silliman, being state's attorney, recovered judgments for military delinquencies in said Norwalk, to the amount of £70 lawful money, for fines, and for £35-6-6 costs; for which sums he took out executions and delivered them to the sheriff to collect, as appears by a letter he wrote to the petitioners in October A. D. 1787; that he collected on said executions the sum of £41-6-2 of said fines and £4-2-6 of said costs, which he paid to John Davenport, Esq. and what became of the remainder of said fines and cost the petitioners had no knowledge. That in A. D. 1782, they were indebted to said Gold S. Silliman £10 for services, paid him £2-14 in part; that in April A. D. 1786, he sued them on book for £40, on which suit the petitioners were defaulted, and he recovered a judgment for £40 debt and cost, when at the same time they owed him but £7-6. That the petitioners were wholly ignorant of said prosecutions for military delinquencies, until they received said letter in October A. D. 1787, or of the law for the recovery of fines for military delinquencies, whereby the towns were subjected to costs—or that said Gold S.

Chancery will not relieve against gross negligence, nor where the party has remedy by a new trial.

LITCHFIELD COUNTY,

Silliman had taken judgment for more than £7-10 in his said action, until after the commission on his estate had expired, said estate having been represented insolvent : that they were without remedy at law, praying that an injunction be laid on said execution.

Plea in abatement in nature of a demurrer—and judgment of the county court that said petition was insufficient.

Error assigned.—That said petition was sufficient and ought so to have been adjudged.

By this court.—There is nothing erroneous in the judgment complained of.—If the execution is wrong the plaintiffs remedy is by a new trial ; as to their claim they have been guilty of gross negligence, in not exhibiting it to the commissioners in season, against which chancery will not interpose to give relief.

Litchfield County, January Term, A. D. 1794.

Allen vers. Frisbee and Wife.

A promise made in consideration of a discharge given, is not cut off by the discharge.

WRIT of error to reverse a judgment of the county court, in an action brought by Frisbee and wife *vs.* Allen, declaring that on the 7th of February A. D. 1792, the defendant made a settlement with the plaintiffs of an account the defendant had with his wife, antecedent to her intermarriage with said Frisbee ; that there was found due to her the sum of £4-13-3, besides a debt due to Leaverit and company of £6-1, for goods which she had taken up at said Leaverit's store by verbal orders from said Allen, and which was charged to him ; that the plaintiffs proposed to the defendant to give his notes for the said balance of £4-13-3 ; and also to pay said Leaverit and company said sum of £6-1 for the goods she had taken up there ; and that then they would give him a discharge from all demands, &c. to which pro-



posaf of the plaintiffs the defendant assented and agreed ; and thereupon the defendant made and executed two notes for the said sum of £4-13-3 to the plaintiffs, and in consideration of his being indebted as aforesaid, and of the plaintiffs discharging him from all demands as aforesaid, the defendant assumed and promised to pay said debt of £6-1 to said Leaverit and company ; and thereupon the plaintiffs made, executed and delivered to the defendant a discharge of all demands of every kind and nature, and that the defendant had never performed his said promise, nor paid said debt of £6-1 due to said Leaverit and company as aforesaid ; but that the plaintiffs being liable therefor, had been obliged to pay the same.

Plea in bar—That the plaintiffs on the 27th of February A. D. 1792, gave and executed to the defendant a discharge, in the words following, “ In consideration of two notes for £4-13-3, we do discharge said Allen from all books, bonds, notes, damages, &c.” and that there was no agreement entered into between said parties except what was contained in said writing. The plaintiffs replied, that the defendant did in consideration of said discharge promise by parol to pay said Leaverit and company said debt of £6-1, as alledged in the plaintiffs declaration.

The defendant demurred to the plaintiffs reply—and the county court judged that the reply was sufficient, and for the plaintiffs to recover.

Error assigned—That said county court ought to have judged said reply to have been insufficient.

By this court—There is nothing erroneous in the judgment complained of.

Nothing is clearer than that the antecedent indebtedness and the giving of the discharge, was a good consideration of the promise—and that the discharge could not operate to cut off a promise, of which it was the consideration,

Cook *vers.* Preston.

A mistake in drawing a deed, relieved against in chancery.

ERROR to reverse a decree in chancery of the county court, upon a petition of review brought by Cook against Preston—stating, that said Preston brought his petition against said Cook to the county court holden at Litchfield, in March A. D. 1793 ; shewing that in A. D. 1736, lot No. 56, in the Waterbury river division, was laid out to Thomas Peirce, bounding east on Waterbury river, south on lot No. 57, north on lot No. 55, and west on land laid out to the heirs of Josiah Harris, 100 rods on said river at the east end, 100 rods north and south at the west end, and 140 rods on the south line, and 20 rods on the north line, and was laid out for fifty acres. That on the 19th of March A. D. 1792, said Preston executed to said Cook a deed, with covenants of seisin and warranty, of a tract of land described in said deed as follows, viz. one piece of land in Litchfield, containing fifty acres, more or less ; bounded east on Waterbury river, north on David Morfe, west on Harris Hopkins, south on high way in part, and part on Clark Royce, Reuben Atwater and Chace Harrington ; being the whole of the 56th lot, with the buildings thereon standing. That said Cook on the 27th of November A. D. 1792, instituted an action against the petitioner, on the covenants of seisin in said deed, alledging for breach that the petitioner was not seized of thirty acres of said land in said deed, being the south part of said described tract ; but that the same at the date of said deed was owned by said Clark, Reuben and Chace ; which action was then pending, and which they agreed to submit to the arbitrament of the honorable Oliver Wolcot, Esq. and Andrew Adams, Esq. and that their award should be the rule of damages in said action : that said arbitrators found against the petitioner that he should pay the sum of £87-16-8 damages. That it appeared to said arbitrators that said 56th lot was originally laid out to contain said thirty acres owned by said Clark, Reuben and Chace, of which the petitioner was wholly ignorant, until

then, and contained eighty seven acres, when according to the survey bill thereof, it did not contain said thirty acres ; that at the date of said deed it was well known to belong to said Clark, Royce, &c. that in the contract and bargain it made no part of the consideration, was not sold nor pretended to be by the petitioner ; that they applied to Esq. Catlin, to draw said deed, and informed him of their bargain, and instructed him to draw said deed, so as to convey all the land lying within the north east and western boundary, and south to the northern boundary of said thirty acres, then in the possession of said Royce, &c. and no more, and the true boundaries of said thirty acres were well known to all parties ; but said Catlin by mistake, contrary to the instruction and intent of the parties, inserted these words, being the whole of the 56th lot ; which was not observed by either of the parties at the time of executing said deed, and praying that said award might be cancelled, and a perpetual injunction laid on said Cook, not to prosecute him on the covenants in said deed, or otherwise grant him relief.

The respondent made answer by denying the facts alleged in the petition, as the ground for relief.

The county court heard the cause on the merits, and found the facts alleged in said petition to be true, and decreed said award to be cancelled, and laid Cook under a perpetual injunction not to prosecute said Preston on the covenants in said deed—and that said Cook brought a petition of review to the county court, stating that he had, since said decree, found new and material evidence, viz. Joel Bradley, &c. &c. who would testify that the contract was for the whole of said fifty-sixth lot, that the instructions to Esquire Catlin, were to draw the deed for the whole of said lot in the very words in which it is drawn ; and that said Preston declared that he meant to convey the whole, and run the risk of holding it.

Plea in abatement—That all the pretended new evidence was well known to said Cook, and might have been had at said former trial, but for his own

negligence, and prayed said court to dismiss said petition, because it did not contain sufficient reasons for a rehearing ; and thereupon said county court judged said plea in abatement to be sufficient, and dismissed said petition as insufficient.

Error assigned—That the county court ought to have judged that said petition was sufficient.

By the court—There is nothing erroneous in the judgment complained of.

According to the facts stated in Preston's petition, which are found to be true by the court, nothing can be clearer, than that he ought to be relieved against the mistake in drawing the deed, and that the relief granted was proper.

Whether the petition of review contained any new matter, or new evidence, which was not, or might not have been had at the trial but for the negligence of the petitioner, the court who heard the cause are the only proper judges.

— Spencer, Esq. Judge of Probate *vers.*
Silas Church, &c.

An administrator is not liable upon his bond for a note, which was distributed to him and other legatees, and afterwards sold by him.

ACTION on the administration bond, conditioned that said Silas, who being appointed administrator on the estate of Samuel Church deceased, with the will annexed, should faithfully administer on said estate.

The defendants plead that said Silas had performed the condition of said bond.

The plaintiff replied and assigned sundry breaches, amongst which was, that he had wasted and embezzled a certain state note for the sum of £163, and which was inventoried at £28 lawful money.

The defendants traversed all the breaches assigned in the reply, and the parties were at issue to the court. —The court found in favor of the plaintiff as to two of the breaches assigned ; but as to the £163 note,

it appeared that said note was on the 6th of May, A. D. 1790, distributed to and among eight legatees, said Silas being one; and each legatee thereupon became entitled to one eighth of said note in common with the other seven; that said Silas kept said note and sold it in July A. D. 1790, and was accountable to each legatee for his part; but as administrator, the court found he had been guilty of no breach of the condition of the bond in this article.

Doty vers. Reed.

ACTION of the case describing the defendant to be an absconding debtor, and a copy left with a person described to be his agent, factor, trustee, &c. and who had of his effects in his hands. It was determined that the defendant could not in this stage of the cause plead that the person copied was not his agent, and had not his effects in his hands; for this would deprive the plaintiff of the benefit of the garnishee's oath, which he is entitled to by law upon the *scire facias*.

An absconding debtor cannot plead that the person copied has no effects of his in his hands.
Vide Bacon *vs.* Masters, ant.

Baldwin vers. Potter.

ERROR to reverse a decree in chancery of the county court, on a petition brought by Potter *vs.* Baldwin, stating that in March A. D. 1788, he was indebted to Catlin, £9, for which Samuel Phelps gave his note to said Catlin, payable in six months, and for his indemnity took a deed of the petitioner of two acres of land, worth £50, which it was agreed should be deposited in the hands of the town clerk, to hold and not to record, and to be delivered up to the petitioner upon his paying said Catlin the debt for which said Samuel Phelps gave his note—that the petitioner went into Vermont and by sickness was prevented from returning in said six months to pay said debt—that said Baldwin applied to said Phelps to purchase said land, and to Catlin for said note, but was

A deed delivered into the hands of a third person to hold and to be delivered up on certain conditions, needs no memorandum in writing.

LITCHFIELD COUNTY,

refused ; said Baldwin then applied to said Catlin and falsely affirmed to him, that he was desir'd by said Phelps to pay and take up his said note ; said Catlin not suspecting any evil design, received the pay and delivered up said note to him ; and having thus fraudulently obtained said note, said Baldwin went to said Phelps and threatened him, that unless he would give him a deed of said land, he would immediately put his note in suit, upon which said Phelps gave him a deed of said two acres of land, upon said Baldwin's promise to reconvey it to the petitioner, upon his paying him said debt ; alledging that said Baldwin refused to reconvey to him said two acres of land, and praying that said Baldwin be ordered to reconvey said land upon his paying said debt, &c.

The respondent demurred to this petition, because there was no written defeasance to said deed ; and the court gave judgment that the petition was sufficient ; and upon a hearing on the merits, the court found the facts alledged in said petition to be true, and ordered and decreed, that the petitionee reconvey said land to the petitioner upon his paying the balance of the debt paid to said Catlin, and interest.

Error assigned—That the county court ought to have judged said petition to have been insufficient.

And by this court—There is nothing erroneous in the judgment complained of. The deed, by the agreement of the original parties, was deposited in the hands of the town clerk, to be held by him, unrecorded, and to be delivered up to the petitioner upon his paying said Phelps' note to Catlin, and not to be delivered over to Phelps, until there was a final failure on the part of the petitioner to pay and indemnify said Phelps, on account of said note ; that no writing or memorandum was necessary to control the operation of the deed between said parties, and said Phelps could convey no greater right than he had by the deed lodged with the town clerk.

Stevens *vers.* Payne.

ACTION of the case, declaring that the parties submitted to arbitration, a dispute relative to a note for £15, which the defendant held against the plaintiff and which was in suit, and gave notes to abide the award of arbitrators, and agreed that said suit should be dropped; that said arbitrators made an award in the premises in favor of the plaintiff; and that the defendant contrary to his agreement and unknown to the plaintiff appeared in said action and recovered judgment for a large sum in damages and took out execution, by which the plaintiff was put to great trouble and cost to get relieved from.

The record of the justice, and the justice and the jury admitted to testify, whether a certain claim was brought in to be offset or not, in a trial at law, in the state of New-York.

The defendant plead in bar, that said judgment was by mistake, and that he never collected any thing of the plaintiff on said execution; that he had since brought a suit before a justice in the state of New-York against the plaintiff; and by the laws of said state, if a defendant has any claim against the plaintiff in the suit, under £10, he may plead an offset, or be forever debarred of recovery of it afterwards, unless the balance found due to the defendant, by the court that hath cognizance of said cause, exceeds the sum of £10; that the plaintiff brought in and had offset and allowed sixteen shillings by the jury for the damages demanded in this action.

The plaintiff traversed the defendant's plea in bar.

Issue to the court.—The principal question was, whether the plaintiff's present demand was brought in and offset in the action before the justice in the state of New-York. The justice was present and some of the jury, who tried said cause. The justices records certified by him, were admitted to be read in evidence. The justice and the jurors were admitted to testify, that the present plaintiff exhibited no claim to be offset, in that action, but that he then declared his claim was more than £10, and that the sixteen shillings found for him by the verdict was for his spe-

LITCHFIELD COUNTY,

cial damages in that particular action; for being sued without any cause.

The court found that the plaintiff's claim in this action, was not brought in and allowed in the action in the state of N. York; and that the plaintiff recover.

State *vers.* Benjamin Lockier.

New trial granted on an information for burglary.

INFORMATION for a burglary, for breaking open T. Collier's Printing-Office and stealing a book, of which he was convicted by the jury. Before sentence was given against him, a motion was made for a new trial, on the ground of having discovered new evidence; and on a hearing of the new evidence, a new trial was ordered.

Action of assumpsit doth not lie for a collector who has moved out of the state, to recover for taxes he has not collected.

Simeon Smith *vers.* Crocker.

ACTION of indebitatus assumpsit, for money paid and advanced for the defendant; declaring that he was collector of state taxes, in the town of Sharon, for the years A. D. 1782, '83 and '84; that he had fundry taxes in his rate bill against the defendant, amounting in the whole to £30; that he had paid and settled all the defendant's said taxes with the treasurer, and had never collected or received any pay therefor from the defendant; that in A. D. 1787, the plaintiff moved out of this state into the state of Vermont; and said taxes paid for the defendant as aforesaid still remained due to the plaintiff.

The defendant demurred to the declaration; and judgment, that the declaration was insufficient.

By the court—It is the plaintiff's own fault that he has removed out of the state, without collecting said taxes; besides he has an execution for these taxes in his own hands, and ever has had, by which he may come into the state and collect said taxes.

Jacob Welles *vers.* Afa Hutchinson, town clerk.

ACTION of the case, declaring that in March A. D. 1783, James Holms mortgaged a farm of land to Joshua Welles, to secure the payment of a debt of £500, payable by the first of November A. D. 1783; which deed was handed to the defendant and entered upon, received for record, but not recorded; that said Welles being indebted to Nathaniel Platt, the sum of £300, mortgaged said lands to him for security of said debt, which deed was delivered to the defendant and entered upon, received for record, but not recorded. In January A. D. 1784, said debt from Holms not being paid, said Welles being indebted to the plaintiff the sum of £177, gave him a mortgage of said land to secure the payment of said debt; which deed was delivered to the defendant and entered upon, received for record, but not recorded; and that the plaintiff had paid and purchased up said mortgage deed from said Welles to said Platt—and the plaintiff further declared, that on the 27th of May A. D. 1784, none of said deeds lodged with the defendant and entered upon as aforesaid, being recorded, and none of said sums paid for which said land was mortgaged, said Holms, Welles, and one Seth Overton, together with the defendant, being perfectly acquainted with the situation of said deeds, combined together to wrong, injure, and defraud the plaintiff, in the following way and manner, viz. The defendant to deliver up to said Holms his deed given to Welles unrecorded, upon said Welles' order, and then for said Holms to give a deed of the same land to said Seth Overton, which would compleatly defeat the plaintiff's title; and that the defendant did accordingly deliver up to said Holms his deed to Welles, unrecorded; and said Holms executed a deed of said lands to said Seth Overton, which was immediately recorded, and the title to said lands at law, vested in said Overton; and that said Holms, Welles and Overton were bankrupts.

A town clerk having received a deed and entered upon it, received for record, may not deliver it up unrecorded.

Plea—Not guilty. Issue to the jury. The jury found a verdict for the plaintiff, and £30 damages.

The court accepted the verdict and declared the law in the case—That a town clerk being an officer of public trust and confidence, much depended upon his duly attending to the law in the execution of his office, and he having once received a deed as town clerk and entered upon it, received for record, may not suffer it to go out of his hands, unrecorded ; as he will be answerable in damages, to any person that shall be prejudiced thereby ; and although by this means the plaintiff's title at law is wholly destroyed, and his damage is the whole amount of his debt and what he paid to Platt, yet as the plaintiff has a certain remedy in chancery against said Overton to compel him to release said land to the plaintiff, or pay him what is justly his due, the court are content with the sum given in damages.



Hartford County, February Term, A. D. 1794.

King *vers.* Brockway.

A minor who is not the poor of a town, is not liable to be bound out by the select-men. The assent of the civil authority is necessary to validate such an indenture.

ACTION of the case for enticing away Morris Scot, an apprentice, duly bound to the plaintiff by a legal indenture, dated the day of June A. D. 1791, from that time till he should arrive to the age of twenty one years, being then nineteen years old, &c.

Plea in bar—That fourteen years ago the defendant married the mother of said Morris Scot, that she still lived with him and is his wife ; that he was appointed guardian to said Morris by the court of probate in August A. D. 1791 ; that said Morris had ever lived with the defendant and his said mother, as his father in law and guardian, who had taken proper care of his education and support ; that said Morris

had an estate which descended to him from his ancestors, and was of sufficient ability to maintain himself ; that he was not nor ever had been one of the poor of said town, and that said indenture mentioned in the plaintiff's declaration, was made and executed by three of the select men of said town, there then being five in said town, without the knowledge or consent of any of the civil authority in said town, otherwise than as one of the select men who signed said indenture, was a justice of the peace ; and that said indenture was void. The plaintiff replied, that one of said select men was a justice of the peace, and that another justice of the peace in said town had since the giving of said indenture been applied to and had given his assent ; and that said indenture was also given with the approbation of the defendant. The defendant rejoined and traversed said indenture's being given with his approbation.

The plaintiff demurred. Judgment—That the rejoinder of the defendant was sufficient, and that the defendant recover his cost.

By the court—This boy was not one of the poor of said town, and so was not a subject to be bound out by the select men. The select men have no right to bind out by indenture, but with the consent of some one of the civil authority in said town, certifying his assent at the time of giving said indenture ; and one of the select men who signed this indenture, being also a justice of the peace, doth not help the matter ; for he could not act in both capacities at the same time, and in the same transaction ; and the after assent of another justice of the peace cannot make valid that which was originally invalid. This judgment was carried to the supreme court of errors and was there affirmed upon a writ of error.

State *vers.* Isaac Phelps.

INFORMATION for making false and counterfeit guineas. The prisoner plead not guilty, and put himself on the country for trial—The prosecutor did

On an information for counterfeiting guineas.

was, evidence of the party's confession admitted although the guineas were not produced.

not produce any of said guineas upon the trial, having never been able to possess himself of any of them.

The defendant's council objected against any evidence being given to the jury unless some of the guineas were produced, and referred to the case of the State *vs.* Osborn, 1 vol. Root's reports, 152, and State *vs.* Blodget, 534.

By the court—It has been determined upon an information for passing counterfeit money, that no evidence may be received respecting its being counterfeit, without producing the money which was passed, but in such case evidence of the parties own confession would be admitted; and where the information is for counterfeiting only and no money was passed, as is this case, and the prosecutor hath never been able to get hold of any of the money to produce evidence of what the party had said and confessed respecting his making counterfeit guineas, was proper to be given to the jury, and this was analogous to the rule adopted in civil causes, where a bond or deed is denied, which has subscribing witnesses, no evidence of its execution is admitted, without the witnesses, if they are to be had, except evidence of the parties having confessed or acknowledged the instrument. *Pish!!*

Granger *vers.* Hancock.

Full cost allowed where the title to land is the principal matter in dispute.

ACTION for a trespass committed on certain lands described in the declaration, being a fish-place adjoining upon Connecticut river.

Plea—Not guilty. **Issue** to the jury—and verdict that the defendant was guilty, and that the plaintiff recover ten shillings damage. In this case the title was almost the only matter in dispute. The plaintiff appealed the cause; and the defendant objected against the plaintiff's recovering any more cost than damages. The court allowed full cost, upon the ground that the title to the land or fish place was the principal matter in dispute.

Newton *verf.* Paddock.

ACTION upon a certain covenant or agreement in writing, declaring that on the 25th of February A. D. 1792, in Martinico, the defendant covenanted and agreed with the plaintiff, in consideration of six pounds per month, and certain other privileges to be allowed to the defendant, to go with the plaintiff's vessel, after having touched at St. Eustatia, to Swansborough, in North-Carolina, if there should be sufficient depth of water in the harbour to get out loaded; and the plaintiff gave to the defendant written instructions as follows, "I desire you to go to Swansborough, if there is sufficient depth of water in the harbour to come out loaded; and to purchase the following articles, viz," and particularizes them; that the defendant never went to said Swansborough, nor so much as enquired whether there was sufficient depth of water to come out loaded or not; but went directly to Wilmington in North-Carolina, where he was obliged to give much dearer for said articles, and put the plaintiff to great expence, and so delayed the voyage, as to deprive the plaintiff of all advantage from it. The defendant demurred to the declaration.

On a contract to go to a certain port if there is sufficient depth of water in the harbor, it is the duty of the defendant to find out and to know whether the depth of water is sufficient.

The exception taken under the demurrer was, that the plaintiff had not averred that there was sufficient depth of water in said harbour to come out loaded.

Judgment—That the declaration was sufficient, and for the plaintiff to recover.

By the court—It was unknown to the plaintiff at the time of making the agreement whether there was sufficient depth of water in the harbour for his vessel to come out loaded or not; the defendant covenanted to go there with the plaintiff's vessel, at all events, if there was sufficient depth of water to come out loaded; nothing can excuse the defendant from his agreement but the want of a sufficient depth of water in the harbour; and he never went to see nor so much as to enquire. It lies on the defendant to shew that

TOLLAND COUNTY,

there was not sufficient depth of water in the harbour for the vessel to come out loaded, in order to exculpate himself ; and not on the plaintiff to shew that there was, in order to make the defendant liable.

Beecher vers. Sheriff Chester.

If a party mistakes ever so small a sum in setting forth a judgment, it is fatal upon *nisi* record, plead.

ACTION declaring that the plaintiff recovered a judgment before the superior court, holden at Hartford, in September A. D. 1792, against Asa Bray, for the sum of £36-13-6 debt and cost, including the execution ; and that he took out his execution for said sum and delivered it to Jonathan Root, one of the defendant's deputies, who received the same to levy and collect, and that he had wholly failed to levy and collect the same.

The defendant plead that there was no such record and judgment as was set forth in the plaintiff's declaration. The plaintiff replied, that there was, and prayed the court to inspect the record. The court upon inspection found, that there was no such record and judgment, for the record was of a judgment for £36-14, including said execution, which was not the same declared upon.

Tolland County, February Term, A. D. 1794.

Cross vers. Guthery.

An action for damages lies in favor of the husband against a surgeon for unskillfully operating upon his wife, notwithstanding she dies of the operation.

ACTION of the case declaring that on the 10th of October 1791, the plaintiff's wife had a scrofulous humor in one of her breasts, which required amputation ; that the defendant, who then was, and for many years before had been a practising physician, and professed to be well skilled in surgery, and in the amputation of limbs, applied to the plaintiff and affirmed to him that he had competent skill

and knowledge to cut off his wife's breast, and to make a cure of it, and that he could and would for a reasonable reward, perform said operation, with skill and safety to his said wife; and the plaintiff relying upon the defendant's declarations aforesaid, consented to his performing said operation, and agreed to pay him therefor whatever should be a reasonable compensation; and the defendant in consideration thereof undertook and promised to perform said operation with skill and safety to the wife of the plaintiff; and that on the 10th of October aforesaid, the defendant did cut off the breast of his said wife, and performed said operation in the most unskilful, ignorant and cruel manner, contrary to all the well known rules and principles of practice in such cases; and that after said operation, the plaintiff's wife languished for about three hours and then died of the wound given by the hand of the defendant; and that the defendant had wholly broken and violated his undertaking and promise to the plaintiff to perform said operation skilfully and with safety to his wife; whereby the plaintiff had been put to great cost and expence and been deprived of the service, company and consortship of his said wife—damage £1000.

The defendant plead in bar that on the 21st of October A. D. 1791, the plaintiff owed the defendant £15 on book for doctoring his wife, and the plaintiff demanded damages for the injury complained of in the declaration, whereupon they mutually agreed to offset said claims the one against the other; and the defendant discharged the plaintiff from said book debt, and the plaintiff accepted the same in full satisfaction of said accord and of the injury complained of in the declaration.

This plea was traversed by the plaintiff; on which the parties were at issue to the jury. The jury found that it was not accorded and agreed, &c. as the defendant in his plea in bar had alledged, and found for the plaintiff to recover £40 damage and his cost.

TOLLAND COUNTY,

The defendant then moved in arrest of judgment—that the declaration and matters therein contained, were insufficient to render a judgment upon. The exception taken to the declaration by the council for the defendant, was that the offence charged, appeared to be a felony, and by the laws of England, the private injury was merged in the public offence.

By the court—The declaration is sufficient. The rule urged by the defendant, is applicable, in England, only to capital crimes, where from necessity, the offender must go unpunished, or the injured individual go unredressed.

Pomroy vers. Kibbee.

Although an award spreads over more time than the submission, yet the award is good if no injury is effected by it.

WRIT of error to reverse a judgment of the county court in an action brought by Kibbee *vs.* Pomroy, upon a bond dated the 19th of September A. D. 1793, for £10 with a condition that the defendant would abide the award of Aaron Horton, &c. arbitrators, which they should make in an action of book debt commenced on the 30th of April, A. D. 1793, and then depending in court. That said arbitrators made an award, and published it to the parties, as follows:—1st, That said book debt action should cease—2d, That said Pomroy should pay to said Kibbee £5-0-7 lawful money, the balance found due on their book accounts—3d, That said Pomroy should pay £2-19-17 for cost—4th, That upon said sums being paid, they awarded that said parties should execute to each other mutual discharges of all book accounts subsisting between them from the beginning of the world up to the date of said bond. The plaintiff then assigned a breach on the part of the defendant; that he had not kept and performed said award nor paid the penalty of said bond, &c.

The defendant plead that he owed the plaintiff nothing on said bond. Issue to the court. The court found that the defendant did owe and gave judgment for the plaintiff to recover £8 damages and cost.

Error assigned was—That said arbitrators by their award, had ordered discharges to be given of all subsisting accounts up to the date of said bond, which was the 10th of September A. D. 1793, whereas the submission was only of the action on book which included no accounts later than the date of the writ, which was the 30th of April A. D. 1793.

Plea—Nothing erroneous—and judgment—nothing erroneous.

By the court—Although the award spreads over more time than is contained in the submission; yet it not being averred nor shewn, that there had been any dealing between the parties or debts contracted on book between the date of the writ and the date of the bond; the court presume that there was not any, and consequently there is no reason for setting aside the award on that account.

State verf. Ford.

INFORMATION for forging certain notes. Plea not guilty. Issue to the court.

It was objected that the prosecutor might not introduce any evidence to prove the forgery, unless he produced the notes.

On a prosecution for forging notes, evidence may be given, that the defendant had destroyed them, or that he owned he had forged them, without producing them.

By the court—Evidence may be received to prove that the prisoner destroyed the notes to prevent their being produced; also evidence of what the prisoner has said by way of owning or acknowledging that he forged the notes.—Vide the case of the *State vs. Phelps*, ante. determined at Hartford this circuit—Root's reports, 1 vol. 152.

Strong verf. Samuel Peters.

ACTION declaring that in September A. D. 1769, the defendant offered to sell to the plaintiff a right of land in Thetford, in the state of Vermont, as administrator of John Powers, and to

In an action for a fraud in the sale of lands, no recovery may

he had if both parties have equally the means of knowledge.

induce him to purchase said right, falsely affirmed to him that as administrator aforesaid, he had good right to sell the same; which right of land contained three hundred and fifty acres, and was originally granted to David Carver; and that the defendant declared that said Powers died seized of said right in fee, and that the defendant had orders from the court of probate to sell it; the plaintiff relying upon the affirmation aforesaid, made by the defendant as being true, purchased said right of land of the defendant, and took a deed of it, and gave him £14 lawful money for it; and that said Powers did not own said right in his life time, nor at his death; and the defendant had no orders from the court of probate to sell said land, and that he had been evicted of said right in the law. Damage £600.

Plea—Not guilty. Issue to the court.

Upon the evidence it appeared, that the defendant was administrator on the estate of said John Powers, of Hebron, that said Powers' estate was insolvent, and the defendant had orders from the court of probate in East-Haddam to sell all the estate of said Powers, both real and personal; and that the defendant had a deed from said David Carver to said John Powers, of said right of land in his hands at the time of the sale, which he shewed to the plaintiff; and in the deed he gave to said Strong he recited all the power he had, to sell, as administrator of said Powers, whereby the plaintiff could judge of his legal right to sell as well as the defendant.

The court found that the defendant was not guilty. For it appeared that the plaintiff had as full knowledge of said Powers' title to said right, and of the defendant's authority to sell it, as the defendant had, and might judge for himself; and if he was taken in, it was by his own mis-judging, for the defendant in virtue of his power as administrator, conveyed all the interest said Powers had in said right of land to the plaintiff.

Windham County, March Term, A. D. 1794.

Brown and Wife vers. Peirce.

ACTION on note, declaring that the defendant in and by a certain note dated the 21st of January A. D. 1791, for value received promised the plaintiff's to pay to them the sum of £59-16-8 lawful money, on demand with interest; the defendant prayed oyer of said note, and plead in abatement, that there was a material variance between the note declared upon and the note shewn on oyer; for that the note declared upon was a note in which the defendant promised solely; whereas the note shewn on oyer was a note in which the defendant jointly and severally with John Dorrance, promised the plaintiff's, &c. This plea was demurred to, and judgment—that the plea was sufficient.

A joint and several note must be declared upon as such.

Reynold Barber vers. Robert Gordon.

ACTION on note, dated the 1st of November A. D. 1791, for two tons of iron, payable the 1st of November A. D. 1792, which had never been paid—Writ dated 21st of November A. D. 1792.

If the issue joined to the court is immaterial, the court will give judgment according to the right of the cause on the whole record.

Plea in bar—That said note was given in pursuance of a contract entered into by the defendant for the purchase of an iron works, &c. of the plaintiff, and was given for a part of the price. That on the 2d of February A. D. 1793, it was agreed between said parties that the contract and sale of said iron works should be thrown up and vacated, and thereupon the plaintiff and defendant made and executed to each other, under their hands and seals, a writing containing a dissolution of said contract, and also mutual covenants respecting what should be done in consequence thereof; in and by which, said Barber agreed to release and discharge said Gordon from said bargain and contract, for the purchase of

said works ; and that said Gordon should have the use and improvement of said iron works, until the first of November then next, and then to deliver them up to said Barber, said Gordon to pay for the rent £115, which said Barber agreed he had received in a deed of two pieces of land ; and said Barber was to deliver up the securities taken for the aforesaid works, and all the notes which he held against said Gordon, which were given therefor, the note on which being one, according to the condition of the bond, that said Gordon held against said Barber, for a deed and lease of said premises, in fulfilment of said first agreement and contract—and said Gordon agreed to deliver up said bond to said Barber, and to pay £115 for said rents, in land, of which said Barber had received a deed ; also said Gordon was to pay an order for £8 given to Moses Barber, in blacksmith's work, and to resign up said works in as good repair as they then were, and to pay all the quit rents and taxes ; said agreement dated the 2d of February A. D. 1793, and that the defendant had kept and performed all his covenants and agreements in said instrument, contained on his part to be kept and performed, and thereupon the plaintiff ought to be barred.

The plaintiff replied to the plea in bar, that said written agreement dated the 2d of February, was obtained by fraud and was void, and he ought not to be barred without that, that the defendant had kept and performed all his covenants and agreements in said writing contained on his part to be kept and performed.

The defendant rejoined that he had kept and performed all the covenants and agreements in said writing, contained on his part to be kept and performed. Issue to the court.

The court upon hearing the evidence and arguments found that the defendant had not kept and performed all the covenants contained in said written agreement—yet were of opinion, that the issue was immaterial.

By the court—The plaintiff has not traversed nor avoided the material allegations in the plea in bar; which are, the agreement to discharge said contract and purchase, and to deliver up all said securities and notes given for said works, the note on which being one; these stand unanswered, they are therefore confessed—judgment therefore must be for the defendant, upon the principle, that on the whole of the record and pleadings, the plaintiff ought to be barred—for whether the defendant had performed all the particulars which he covenanted to do or not, is very immaterial; for the plaintiff has a security for it, and a certain remedy to enforce the performance. The plaintiff having in the inducement to the traverse, said that said written agreement was obtained by fraud and is void; but it is introduced as inducement to his traverse only, in such a manner, and is so vague and uncertain in itself, that no answer ought or could be given to it.

It was urged, that said instrument dated the 2d of February 1793, could not be plead in bar, but the defendant might have his remedy by action for a breach of it; but by the court, the writing containing a dissolution of the bargain, it follows of course that each party would be put in statu quo, and the covenants mutually entered into therein, among other things, provides for this, and a covenant never to demand, or to deliver up a note to the promisor, is a good bar to an action on that note.

Bailey *vers.* Tillinghaft.

ACTION of the case, declaring, that in January A. D. 1792, the plaintiff sold to the defendant a farm at the price of one thousand dollars; and in part payment he delivered to the plaintiff a receipt executed by David Dorrance to the defendant for 615 dollars in final settlement notes, said receipt dated the day of April A. D. 1789, and payable in December A. D. 1789, with interest; and that the de-

Where the sum to be paid is referred to the judgment of a particular man, no duty accrues till he has given his judgment.

fendant by a written agreement dated January 4th, 1792, warranted said receipt to be equal in value to final settlements at that time; and that whatever said 615 dollars in final settlement notes should fall short in value of 1000 dollars in silver, to be estimated by Sylvester Fuller, of Providence, the defendant engaged to pay, one half in one year with the interest, and the other half in two years with the interest; and that said Dorrance did not pay said final settlement notes, and that the plaintiff recovered by the judgment of the superior court only £69-15 lawful money, against said Dorrance, on said receipt, which fell short of one thousand dollars the sum of £230-5 lawful money, one half of which being £115-2-6 the defendant promised to pay in one year from the 4th of January A. D. 1792, with the interest, which he had not done—damage £230—writ dated the 15th of July A. D. 1793.

The defendant demurred to the declaration—and judgment, that the declaration was insufficient.

By the court—The agreement declared upon in the first place warrants Dorrance's receipt to be equal to final settlement notes, and that the final settlements are recoverable of said Dorrance; the defendant then agrees to pay the difference between 615 dollars final settlement notes, and 1,000 dollars specie, to be estimated and determined by Sylvester Fuller, of Providence; the one half in one year and interest, the other half in two years with interest. The difference between Dorrance's receipt for 615 dollars final settlements and 1,000 dollars in specie, as determined by the superior court, and the difference between 615 dollars final settlements, and 1000 dollars specie, as shall be estimated by Sylvester Fuller, are two things. And this action is an attempt to recover the difference in the former case, upon the agreement to pay the difference in the latter, without ever having had the determination of said Sylvester Fuller in the matter; and until that is done and an estimation is made by said Fuller, no action will lie upon that part of the agreement.

Snow vers. Chapman.

ACTION of indebitatus assumpsit for money had and received by the defendant for the plaintiff's use.

A general action of indebitatus assumpsit will not lie, where there is a special agreement.

Plea—Non assumpsit. Issue to the court.

The plaintiff, to make out his case, produced a deed given by the defendant, of a certain farm, particularly bounded out, and said to contain one hundred and ten acres, for the consideration of £180 lawful money, and that it was agreed by the defendant at the time of giving said deed, that in case the farm fell short of said quantity of one hundred and ten acres, he would repay or return in that proportion of the consideration money; and that said farm fell short in quantity nineteen acres, and that the defendant had not repaid him in that proportion, of the consideration paid.

The court found that the defendant did not assume and promise, &c. upon the ground, that a general action of indebitatus assumpsit would not lie in such case as the present, but that the remedy must be by a special action of the case, founded upon the agreement, in order to prevent any surprize upon the defendant, and that the case may appear upon the record, and be a bar to any other action, for the same cause.

New-London County, March Term, A. D. 1794.

Reynold Huntly and his Wife Esther *vers.*
John Compstock.

ACTION of ejectment for a tract of land.—
Plea—No wrong or disseisin. Issue to the jury.

The record of a baptism made by the minister of the

parish, is evidence of the fact.

The plaintiff's title was in right of the wife, under a distribution of her father's estate, setting out these lands to her.

The defendant set up title under a deed from said Esther and her former husband Allen McNight, dated the day of November A. D. 1772, by them executed, acknowledged and recorded. To this the plaintiffs objected, that said Esther at the date of said deed was not twenty-one years of age. To prove that she was, the defendant produced the record of her baptism, made by the minister of the parish, who was dead. This was objected against as not being legal evidence.

By the court—It is admissible and conclusive, as a record of the fact of her baptism. By which it appeared that she was baptized on the 4th of August A. D. 1751. Verdict was for the defendant.

Park *vers.* Halsey.

An award by rule of court a good bar to antecedent claims.

ACTION of assumpsit for £15, the price of a horse which was omitted in a settlement by mistake.

Plea in bar—A submission of all matters of controversy subsisting between the parties which was made a rule of the county court in June A. D. 1792, to certain arbitrators mutually chosen by the parties; who made and returned their award in the premises to the county court; in which they found and awarded the plaintiff to pay the defendant £29 lawful money, in full satisfaction of the matters submitted; which award was accepted by said court, and judgment rendered thereon accordingly; in which arbitration the plaintiff brought in all claims and demands he had upon the defendant, and thereupon all his vouchers were delivered up.

The plaintiff replied, that he ought not to be barred without that that he exhibited to said arbitrators all the demands he had upon the defendant, including

the price of said horse, and that the same was considered and allowed by them.

The defendant demurred to this reply ; and judgment—that the reply was insufficient.

By the court—It would open a door for endless litigation, if after a general submission of all matters of controversy, by rule of court, and an award made and returned and accepted by the court, if either of the parties might open the dispute again, by putting the other party to prove that all matters of controversy between them were exhibited and allowed ; and when they might have been exhibited and considered, but not allowed. An action might as well be brought and maintained for a mistake after a verdict of a jury.

Halley ver/. Fanning.

ACTION of ejectment for land, commenced by an attachment. The defendant gave bail to the sheriff ; and at the county court he appeared, and plead that he had done no wrong or disseisin, and put himself on the country ; which plea was accepted and closed by the plaintiff, and no motion made on his part that the defendant should be taken into custody, or that he should give special bail to the action. The judgment of the county court, was in favor of the defendant, and that he recover his cost. The plaintiff appealed the cause ; and as the cause was going on to trial to the jury, the plaintiff moved that the defendant should be taken into custody, or give special bail. By the court—There is no law by which it can be done ; the plaintiff has accepted a plea from the defendant, gone to trial upon it, without moving to have him taken into custody, or that he should give special bail ; on which plea he has prevailed, and the plaintiff has appealed the cause. By these proceedings the plaintiff has waived and given up all legal hold of the defendant's person or right, by law, to require special bail.

A copy of a power of attorney admitted as evidence.

A plaintiff who omits to move for special bail in the county court, accepts a plea and appeals the cause, cannot afterwards require special bail.

NEW-LONDON COUNTY, &c.

The plaintiff's title in this case was under Thomas Hopkins, in virtue of a deed from Mary Hopkins his wife, executed by her pursuant to a power of attorney from her said husband Thomas Hopkins, given to her for that purpose; which power of attorney was recorded with the deed in the records of the town, where the land was.

This power of attorney was challenged, and a copy from the town records was produced; which was objected against on the ground that the original ought to be produced.

By the Court—The power of attorney makes a part of the plaintiff's title, and ought to be recorded; and a certified copy from the register is legal evidence of it, and in this case the best the nature of the case will admit of; the original being in the hands of the attorney, and not in the power of the plaintiff to produce, or to have any process to enforce the production of it, as said attorney lives out of the jurisdiction of this court. *Boyl!*

Richard Law, Esq. *vers.* Wilson.

A lawful possession sufficient title to recover in ejectment against a wrong doer.

ACTION of ejectment for a chamber and two closets in a certain house—declaring that on the 13th of October A. D. 1793, the plaintiff was lawfully possessed of said chamber, &c. and had been for more than fifteen years before; and that the defendant on said 13th of October, without law and right, entered with force and arms into said chamber, &c. and deforced and dispossessed the plaintiff thereof.

Plea—No wrong or disseisin. Issue to the jury.

The plaintiff's right and title to the possession was, that Francis Geollet, in A. D. 1762, recovered a judgment and execution against said Wilson, and levied said execution upon said house, chamber, &c. and had it appraised off in part satisfaction of said execution, in which proceeding the plaintiff was attorney to said

Geolet—that the plaintiff entered and took possession of said house and chamber, and in A. D. 1765 said Geolet sent the plaintiff a power of attorney to sell said premises, and he not being able to sell it to his liking, he let it to one Champlin, who held over his lease, and refused to go out; and the plaintiff brought an action of ejectment against him, and in A. D. 1783 recovered the possession by judgment of court, and the execution was levied thereon; and ever since the plaintiff had held and leased said premises, until the defendant entered and dispossessed him as aforesaid; said Geolet who lived in New-York, died some years since insolvent and had left a number of heirs, but none had appeared to claim the estate.

The law question in this case was, whether the possession of the plaintiff was such as would entitle him, to recover the possession in this action against the defendant, who entered tortiously. Verdict and judgment was for the plaintiff.

By the court—The plaintiff's possession was rightful and lawful, and the defendant had no right to deprive him of it—and as he did, the law will redress the plaintiff by restoring to him the possession, for the benefit of the owner.

Middlesex County, July Term, A. D. 1794.

Henshaw vers. Clark and Smith.

ACTION of account, brought against the defendants, as bailiffs and receivers of the monies of the plaintiff—for that on the 1st of October A. D. 1790, the plaintiff and defendants were joint owners of the brigantine Betsey, and ever since have been, in the following proportion, viz. the plaintiff five eighths, and the defendants three eighths; that the defendants have had the possession and use of said

A deposition of a defendant introduced by the plaintiff, may not be taken back—captains of vessels have no right to sell their owners property in

them ; and evidence of such a general practice not admissible.

brigantine from said 1st of October A. D. 1790, to the date of the plaintiff's writ ; in which time he had performed sundry profitable voyages, and the defendants had received the avails thereof, and made great gain thereby, to account to the plaintiff for his part and proportion, which was £300 lawful money ; and that the defendants had ever refused to render their reasonable account in the premises.

The defendants plead that they never were bailiffs and receivers of the plaintiff, in manner and form as the plaintiff in his declaration had alledged. Issue to the jury.

The plaintiff produced and read the deposition of one of the defendants given on a former occasion ; and after he had read it, found that it would be improved against him, moved to the court for liberty to take it back ; this was objected against by the defendants.

By the court—The defendants could not have introduced this deposition, but it being legally introduced by the plaintiff, the defendants have right to take the benefit of it.

The defendants admitted that the plaintiff was part owner of said brigantine in October A. D. 1790 ; and claimed title to their part by virtue of a bill of sale given them by captain Savage, in the West-Indies, he being a part owner and master of said brigantine ; there was no pretence that captain Savage had any instructions or power from the plaintiff to give said bill of sale, other than what every master of a vessel is invested with, in virtue of his being master—and the defendants offered to prove that it was the general practice for masters to sell the vessels of their owners in the West-Indies.

This was objected against by the plaintiff—and by the court, masters may hypothecate the vessels of their owners for certain purposes, and they will be holden ; but that masters should have right, merely as masters, to sell the property of their owners in the vessels they

command, without authority from their owners, would be most unjust and impolitic ; and any practices of that kind ought to be reprobated, as iniquitous and absurd, rather than to be improved as precedents, to establish a rule ; the evidence was rejected.

This being a suit brought against the defendants jointly ; and the plaintiff failing to prove that Smith one of the defendants had ever intermeddled with any of the avails of said voyages ; the jury found a verdict for the defendants.

Mary Alfop, administratrix of Richard Alfop
vers. Michael Todd.

ACTION upon a note dated the 29th of March A. D. 1771, for £45, payable to said Richard in three months, with interest.

A note given by a minor, under the care, &c. of a parent, is made valid and binding upon him, by his consenting to it and agreeing to pay it after he is of full age.

The defendant plead in bar that on the 29th of March 1771, when said note was given, the defendant was a minor, under the age of twenty one years, and under the care of a guardian and parent ; and so said note was void by the statute in such case made and provided.

The plaintiff replied to the defendant's plea in bar—that on the 5th of September A. D. 1781, the defendant being of full age, he then recognized the justice of said debt, and in consideration thereof promised the plaintiff that he would pay the balance due on said note. The defendant traversed the plaintiff's reply, and the issue was closed to the jury.

The jury found that on the 5th of September A. D. 1781, the defendant being of full age, he then recognized the justice of said debt, and in consideration thereof promised to pay the balance due on said note, &c. and found for the plaintiff to recover.

The defendant moved in arrest of judgment, that the issue was immaterial ; that by the statute the note was void, and could not be revived or rendered of

force by any assent or new promise of his, after he came of age.

This motion was demurred to—and judgment was given that said motion was insufficient, and for the plaintiff to recover.

By the court—This case turns upon the question, whether this note when it was signed was *ipso facto* void, or only voidable. The statute at the time of giving this note, upon this subject, and until May A. D. 1784, stood thus : “ That no person, under the government of a parent, guardian or master, shall be capable to make any contract, or bargain, which in the law shall be accounted valid, unless the said person be authorized or allowed so to contract or bargain, by his or her parent, guardian or master.”

The natural and necessary inference to be drawn from the statute, was, that when a person under the care and government of a guardian, parent, &c. was authorized and allowed so to contract, &c., then he would be capable to make a contract, &c. which would be valid in the law—for it would be idle for the statute to say, that such person should be incapable to make any contract, &c. unless authorized and allowed by his guardian, &c. if he was incapable before the making of the statute, or if being thus authorized and allowed by his guardian, he was still incapable to make any valid contract.

This statute, in making the contracts of minors invalid, went upon the idea of their being liable to be imposed upon, for want of competent discretion ; unless they were especially allowed and authorized by their guardian, or parent, &c. which would obviate that defect.

In the revival of the laws passed in A. D. 1784 ; this clause was added ; in which case such parent, guardian or master shall be bound thereby ; this provides an additional security for the creditor ; but does it follow, that in such case, the minor was not also bound ? for wherein is the mighty difference be-

tween the creditors recovering the debt of the guardian, and the guardian's recovering it out of the minor's estate; except only in the circuit of remedies, and in an enhancement of costs—for it will not be pretended that the guardian is to pay this for the minor, who has the benefit of it, without being refunded out of the minor's estate. The case of William May, and Martha his wife *vs.* Joseph Webb, determined in the supreme court of errors, does not militate against this construction of the statute—that was upon a special verdict, found in the superior court—In that case the following points were resolved—1st, That a guardian appointed to a minor when but nine years old, continued guardian until the minor arrived at full age, unless it was a limited appointment, or the minor when arrived to the age of discretion for choosing a guardian should choose another—2d, That the guardian was liable for the contracts made by his ward, with his allowance and consent—And 3dly, which was a principal point, on which that case was decided, the jury found that the goods were taken up with the consent and approbation of Ezekiel Williams, Esq. who was appointed guardian when said Martha was nine years old, and by said Webb were first charged to said Williams, but that he afterwards refused to pay for them, and said Webb discharged him, and charged them to the said Martha; upon which the court determined, that if it be otherwise as to the other points than is adjudged, still in this case it would be that the said Martha a minor, without any guardian, having taken the articles charged by the consent of said Williams, and with an understanding on the part of the creditor, that they were to be charged to said Williams, and were in fact so charged, that then the said Williams became the original debtor; and no discharge of him by the creditor could fix a legal claim on the minor. Kirby's reports, 286.

Further, an infant is by law bound to pay for necessities, and this from necessity; for he may not have a guardian, or may be separated from him, and if he is deprived of all credit, as he must be if he is not

MIDDLESEX COUNTY,

bound by his contracts for necessaries, he must inevitably perish or trust to charity, let him have even so much property.

Again, persons of full age are bound by their contracts with infants ; and the infant when he arrives at full age, has the privilege of dissenting from such contracts, and avoiding them, or if they are for his benefit, of affirming them. Now if an infant's contracts were ipso facto void, they would be so to every intent and purpose, and with respect to all parties, it might be given in evidence under the plea non est factum.

The contracts of infants then are not void but only voidable by them. If the defendant therefore, when he arrived at full age had denied the justice of this debt, and dissented to the note, it could not have been enforced against him ; but instead of that, he recognized the justice of the debt, and agreed and engaged to pay the balance due on the note ; by this, he took upon himself the obligation expressed in the note, and made valid and binding a note which before was voidable ; and this does not in any manner contravene the statute. The statute declares, that no person under the government and care of a guardian, parent or master, shall be capable of making any contract, &c. which shall be accounted valid in the law. But the statute doth not say that contracts made by a person of the above description, shall not or cannot become valid and binding, by the consent and confirmation of such persons, after he or she arrives to full age. This is not a note given by an infant under the care of a parent, merely, on which the statute attaches ; but it is a note given by a person under those circumstances, which has been recognized to be just, assented to, and engaged to be paid by the signer after he was of full age ; upon which the statute does not attach, and about which it is wholly silent. Vide *Lawrence vs. Gardner*, 1 vol. Root's Rep. 477—and *Cowper's Rep.* 201, which is a much stronger case, being a deed of a feme covert.

This judgment was reversed upon a writ of error in the supreme court of errors in June A. D. 1795—for the following reasons, viz.

That all contracts of minors, unless the same appear to be for their benefit or for necessities, are absolutely void at common law, and therefore they cannot be the subjects of ratification or the foundation of an action. To this point is Coke Litt. 171, b. section 259—2d Atkins 34—3d Atkins, 610—3d Burrows, 1794—Salk. 279—2d Stra. 1101—Croke Eliz. 126, 700, 920—5th Coke 119—Croke Cha's, 501.

An infant is not liable at common law even for necessities while under the government of a parent, as is alledged Todd was, in this case.—See Espinasse 170—2d Blackstone's Rep. 1325—2d of Atkins, 35.

Notes of hand by our law are treated as specialties and the consideration cannot be enquired into at law. No contract, the consideration of which is not enquirable into, shall bind an infant.—Salk'd, 386—2d Strange 1102—1 Irvin's Reports, 40.

Our statute perhaps raises the common law, for by the statute the contracts of minors, "unless, they be authorized or allowed so to contract, by his or her parent, guardian or master," &c.—are declared void,

Much is said in the English books about a distinction between void and voidable. It will be found by examination that they generally take this distinction between those contracts which are more solemnly entered into and which are declared void by act of parliament, as usurious bonds, &c. and those which are void at common law, as the bond of a feme covert, &c.

Colt, Bowes, and Hofmer *vers.* Ashbel Cornwell and others.

PETITION in chancery, shewing that before the county court holden in the county of Middle, Chancery will grant an injunction.

#1. Camp. in priv. 552.

tion to prevent a party making use of a legal writ of execution for the purposes of vexation and injustice.

sex, in November A. D. 1788, Frederick Mun, recovered a judgment against Gordon Wetmore, of Middletown, for the sum of £29-19-0-1-2 damages and cost, and took out execution for said sums, dated the 1st of April A. D. 1789, returnable in sixty days; which execution Stephen Titus Hofmer, Esq. attorney to said Mun, on said first day of April delivered to Ashbel Cornwell, a constable of said Middletown, to levy and collect; and took of him a certain writing or receipt, wherein said Cornwell acknowledged the receipt of said execution, and promised said Hofmer to collect said execution in sixty days, if by legal steps it was collectable, and to pay the money to him; which receipt was dated city of Middletown, April 1st, A. D. 1789—that said constable levied said execution on the property of said Wetmore, and took a receipt for said property; but wholly failed to collect and pay said execution; also shewing that said Hofmer instituted a suit on said receipt in his own name, against said constable, before the city court, holden in the city of Middletown, in September A. D. 1789, and recovered a judgment before said city court against said Cornwell, upon default, for the sum of £32-9-4 lawful money, damages and cost, and took out execution for said sums; dated the 29th of January A. D. 1790; that by legal process, and by the agreement of said Frederick Mun, the property of this debt was vested in two of the petitioners, viz. said Colt and Bowes; and the money due on said Hofmer's execution against said Cornwell, was in fact paid to said Colt and Bowes, and said execution endorsed satisfied. That said Cornwell afterwards brought a writ of error to the superior court holden at Middletown, in July A. D. 1791, against the judgment recovered by said Hofmer against him, before said city court; which was reversed, and judgment rendered by said superior court, in favour of said Cornwell against said Hofmer, for his damages, the sum of £33-13-7 lawful money, being the sum paid by said Wetmore and Cornwell, to Colt and Bowes, on the execution of said Hofmer against said Cornwell; and that said Cornwell had taken out execution on said judgment against

said Hofmer, and was pressing him for the money ; and that said Hofmer had no interest in said money ; and that if said Cornwell collected the money of said Hofmer, it would only lay a foundation for a circuit of actions in the law, to recover the money back again to said Colt and Bowes, where it now rightfully was ; praying for a perpetual injunction on said execution.

The respondents plead in abatement, that the petition did not contain sufficient grounds for the relief prayed for—and that the petitioners had adequate remedy at law.

Judgment—That the plea of the respondents was insufficient.

By the court—the petitioners have not adequate remedy at law, for the remedy they pray for, is to have the parties set down where they now are ; and to prevent the respondents from making use of a legal execution, for the purposes of vexation and injustice—Justice is done, the money is where it ought to be, and the petitioners ought to be quieted. This petition was heard on the merits, and granted, and a perpetual injunction laid on the execution.

Sage, Cooper, &c. Committee of the first Society in Chatham *vers.* White.

ACTION of trover for certain notes and bonds given to the committee of said society, declaring that on the day of they were possessed of certain notes and bonds, viz. and describes them, which of right belonged to them ; that they afterwards lost them, and said notes and bonds came into the hands of the defendant, who knowing them of right to belong to the plaintiffs, yet notwithstanding did convert them to his own use.

Where monies are given to an ecclesiastical society for support of schools or the minister, the episcopali-ans have no right to vote in their society meetings respecting the application of said monies.

The defendant plead not guilty, and issue was closed to the jury.

The facts in this case, upon the evidence, were these,—The town of Middletown, including the pres-

ent town of Chatham, on the 9th day of January A. D. 1701-2, at their legal meeting made and passed the following vote and grant, viz.—Whereas there is about forty acres, called Paucowfit Swamp, lying on the east side of the great river, which the neighbors on the east side of said river, may clear and improve for the use of the town, until such time as they shall be in a capacity to maintain a school or a minister, then said land shall be sequestered and improved, and the income thereof, be disposed of for such public use, as the town by vote shall order; said land to remain to the town's use, until they shall have a school or a minister settled on the east side; then to be and remain for the particular public charge of said east side, on the account aforesaid. The people on the east side cleared said swamp, and some years after, that neighborhood was incorporated into an ecclesiastical society, by the name of the third society in Middletown, which is now the first society in Chatham; and said society sold said land, and applied the income for two or three years at first to the support of schooling; but latterly it had been applied to the support of the minister; and of late a majority of the legal voters in said society being episcopalians, claimed to have the interest of these monies applied to the support of schooling; and at a society meeting warned for that purpose, in which the episcopalians voted, it was voted that the interest aforesaid should be applied for the maintenance of schools in said society—and the plaintiffs were appointed a committee to demand and receive said bonds from the defendant, with whom they were deposited by said society to keep; that the defendant refused to deliver them when demanded, or to pay the interest received on said bonds to any other use, than the support of the minister in said society. The law with respect to the right of episcopalians to vote in society meetings, was, as it then stood, as follows, viz. And every person claiming the benefit of this act, which act is entitled an act for securing the rights of conscience in matters of religion, to christians of every denomination in this state, shall be disqualified to vote

in any society meeting, save only for granting taxes for the support of schools, and for the establishment of rules and regulations for schools and the education of children.

Three questions were made in this case—1st, That the original grant being to take effect in futuro, was void—2d, That the episcopalians had no right by law to vote in said society meeting, with respect to the disposition of these monies which were granted and sequestered to said first society, for the support of schooling, or the ministry as they should order—And 3dly, That the action was mis-conceived altogether; for that it ought to have been for the interest only, that being all which upon their own principles they have right to.

The jury brought in a verdict for the plaintiffs; the court dissented from the verdict, and returned the jury to a second consideration, and declared the law in the case. As to the first point made, that a freehold estate cannot be created to commence in futuro, is a principle of the English law, and grew up in the times of feudal darkness; when freehold estates were created by feoffment, and livery and seisin; and yet by the same English law a freehold estate may be created, to commence in futuro by an executory devise; this is regarding forms more than substance. But this was a grant to the neighbours on the east side of the great river in presenti; to clear and improve the land for the use of said town, until they should be in a capacity to maintain a school or a minister; then it should be sequestered, and the income thereof be disposed of for such public use. The first society in Chatham have clearly a right to these monies, to the interest of them, to be applied to the support of schooling, or of the ministry in said society, at their discretion and pleasure.

As to the second point, the episcopalians are not members of said first society, and make no part thereof, they therefore have by the law no right to any part of

MIDDLESEX COUNTY,

said money ; they have right to vote in said society meetings, with respect to granting of taxes for schooling, and with respect to rules and regulations for schooling ; but have no right to vote, with respect to interest given to said first society, for the use of schooling, or the ministry, as they shall direct.

And as to the third point, it is very clear, that the plaintiffs upon their own principles, have right to only the interest of said monies from the time of passing said vote, and not the principal sums secured by said notes and bonds. The jury upon second consideration found for the defendant.

Lovet *vers.* Johnson.

If a note is expressed to be for the premium on an insurance—the court will take notice of the stipulation in the policy, which provides for reducing the premium, on a hearing in damages.

ACTION on a note dated the 22d of March, A. D. 1793, wherein the defendant promised for £60 insurance on a certain vessel, to pay £36 lawful money.

The defendant plead that before the date and impetration of the plaintiff's writ, he had made full payment of the note on which, &c. Issue to the court.

After the cause was appealed into this court the defendant died, and the plaintiff cited in his administrators. The issue was tried by the court.

The defendant claimed to have a defalcation from the note of fifteen per cent. on the ground that the policy of insurance to which this note referred, provided that there should be a deduction of fifteen per cent. in case of a peace ; and that a peace in fact took place before the risk was run.

The plaintiff admitted the facts, but objected against its being done in this action, and cited the case of *Philips vs. Halfey*, 1 volume Root's reports, 194.

By the court—That case is undoubtedly good law ; that note had no reference to any insurance ; that was an absolute note for so much money, and the court had no clue to get at the deduction claimed, but by parol

testimony. In this case the note itself expresses for what it is given, and refers to the policy of insurance ; the court therefore may look to the policy and consider and allow it, which was accordingly done.

Stephen Miller *vers.* Matthew Talcot, Esq. &c.

ACTION of the case, declaring, that in October A. D. 1782, the defendants had and held a certain execution in their favor against Gordon Wetmore, and others, for whom the plaintiff was bail, which execution was for the sum of £ lawful money, then in life, and unsatisfied ; and the plaintiff applied to the defendants and proposed to pay them the sum of £78 lawful money, provided they would transfer and assign to him said execution with power to collect said execution and convert the money to his own use ; to which proposal the defendants agreed, and thereupon the plaintiff paid to the defendants £78 lawful money, and the defendants in consideration thereof agreed and promised to assign to him said execution, unendorsed, with a power to collect and convert the money due on said execution to his own use, without account ; that the defendants had wholly failed of performing their said agreement, and thereupon the defendants had become liable to repay said £78 to the plaintiff, and in consideration thereof had assumed and promised, &c.

The court will not set aside a verdict if substantial justice is done, unless by the rules of the law they are obliged to do it.

The defendants plead in bar a former action of assumpsit, for the same cause, matter and thing, and set forth said former action ; in which a verdict and judgment were given for the defendants.

The plaintiff replied and admitted the action, verdict and judgment for the defendants ; but said, he ought not to be barred, for that the jury in said former action, found all the facts alledged in the declaration to be proved and true, but from the observations made by the council for the defendants, upon the law, in arguing the cause, they supposed that the promise was within the statute against frauds and

perjuries ; and that they were estopped from finding a verdict for the plaintiff ; and the court not knowing upon what principle the jury found their verdict, and supposing it to be, because the jury had not found the facts to be proved, on account of some defect in the evidence which the court did not discover, accepted said verdict although they were of a different opinion.

The defendants rejoined, that the plaintiff ought to be barred without that that said former jury found all the facts to be proved and true, alledged in said former action, and found their verdict in favor of the defendants, because they supposed that by said statute they were estopped from finding a verdict for the plaintiff—upon which, issue was joined to the jury—and the jury found the facts set up and alledged in the plaintiff's replication ; and for the plaintiff to recover. The court accepted the verdict.

In this case, the jury who tried said former action, were introduced and improved as witnesses on this issue.

The defendants, after verdict, moved in arrest of judgment—1st, That said issue was immaterial—2d, That said verdict was insufficient—3d, That said jury had found for the plaintiff £82-13 damages, in which was included the sum of £4-13 for cost in said former action—4th, That the plaintiff's replication was insufficient.

The plaintiff replied to the motion in arrest, that as to the third exception, he had remitted to the defendants, of the damages found by said verdict, the sum of £4-13, which was allowed for cost, and had caused the same to be entered on the record ; and as to the rest and residue of the reasons offered in arrest, he said they were insufficient—and judgment, that the motion in arrest was insufficient, and that the plaintiff recover.

By the court—The plaintiff, in order to avoid the plea in bar, replied that said verdict was found by

the jury through a mistake, with respect to the law, and contrary to the truth of the facts, and that the court accepted said verdict contrary to their own opinions upon the evidence as it appeared to them, upon an idea that the jury, who were acquainted with the witnesses, discovered some defect in their credibility, which the court were unacquainted with.— The defendants instead of demurring to the replication, and bringing up the question of law to the court, whether the plaintiff must not be barred by said former judgment, until removed by writ of error or a new trial, traversed the reply, and went to issue upon the truth of the facts alledged therein; and the jury having found the facts by their verdict, and it appearing that substantial justice was done, the court therefore would not set aside the verdict, unless by law they were bound to do it. The defendants, by traversing the reply, have deserted their plea in bar, and admitted that if the plaintiff's replication was true, he ought not to be barred; they were estopped therefore from excepting against what they, by their traverse had admitted; and it is clear by the facts found in this case, that the plaintiff ought not to be finally concluded by said former trial and verdict, and the only question was, whether this be the most regular mode of proceeding; but whatever doubt there might have been, the defendants have removed it by their traverse.

Thomas Neil *vers.* Miller.

ACTION upon a note or receipt dated the 17th of January A. D. 1783, for two depreciation notes, for the sum of £38-12-9 1-2, which the defendant promised to sell for three dollars on the pound, or to return them. The defendant plead full payment. Issue to the jury.

A receipt denied, and no evidence of its being genuine, may not go to the jury.

The defendant produced a writing, purporting to be a receipt for £38-12-9 1-2 in soldiers' notes in full of the receipt declared upon, with the name of Thomas Neil subscribed to it. The plaintiff denied

the name of Thomas Neil to said receipt, to be the signature of the plaintiff, there being no witness to the receipt, and the defendant not being able to produce any evidence, by comparison of the hand writing or otherwise, that it was the plaintiff's signature, the plaintiff objected against said receipt's being given in evidence to the jury. And by the court—if the defendant had produced any evidence, though ever so small, of its being the plaintiff's signature, it would have been proper to have left it to the jury to weigh; but there being no evidence at all of its being genuine, it would be improper to let it go to the jury.

Henry Crane, &c. Heirs of Henry Crane, deceased, *vers.* David Brainard, and Hannah Willard, Executors of Samuel Willard, the elder.

The estate of a deceased person being distributed, no bar to an action against his executors on the covenants of seisin in a deed.

ACTION upon the covenants of seisin in a deed executed and given by Samuel Willard the elder, to Henry Crane the elder, and ancestor of the plaintiffs; declaring in common form, and alledging a breach.

The defendants plead in bar, that on the 13th of March A. D. 1776, Samuel Willard, the elder, made his last will and testament, and therein appointed George Willard his executor; that after said Samuel's death, said George accepted said trust, and in February A. D. 1780, he caused said will to be proved and approved; that on the 6th of October A. D. 1780, said George made his will, and therein appointed the defendants his executors; that upon the death of said George, the defendants accepted said trust and caused said George's will to be proved and approved; that said Samuel Willard the elder, did not leave personal estate sufficient to pay his debts; and said executors obtained liberty from the general assembly to sell land sufficient to pay his debts, which they did, and paid the debts, and caused the residue of his estate to be distributed to the devisees and legatees in the will, on

the 20th of September A. D. 1784, which distribution had been returned, accepted and recorded in the office of the the court of probate. Further, that the plaintiffs before the death of said Samuel, had full knowledge of said breach of covenant, and never exhibited said claim to his executors, until many years after his death.

The plaintiffs demurred to the plea in bar—and judgment, that the plea was insufficient, and for the plaintiff to recover.

The estate of said Samuel having been settled and distributed, is no objection to the plaintiffs recovering ; and it might have been reasonable and fair for the plaintiffs to have exhibited said claim sooner, but there is no law of limitation, which attaches upon this case to bar the plaintiffs of a recovery.

Nettleton vers. Redfield.

ACTION for trespass upon land. The plaintiff in his declaration had wholly mistaken the bounds of the land, on which the facts were alledged to have been done. Before the cause came on to trial, the plaintiff discovered the mistake, and moved the court for liberty to amend his declaration, by inserting the right bounds, upon paying cost.

A declaration in trespass which mis-describes the land, may be amended upon paying cost.

By the court—This is an amendment at common law, which is for the furtherance of justice ; and no inconvenience will result to the parties therefrom.

The plaintiff was permitted to amend his declaration upon paying cost.

Samuel Bull vers. Talcot, &c. Committee for building the Court-House.

WRIT of error to reverse a judgment of the county court, in an action brought by said committee against said Bull upon a subscription, which

Parol evidence not admissible to explain a writing.

If a promise is made to any one who shall do a certain thing, the person who does the thing is entitled to the promise.

was as follows, viz. "We the subscribers promise to pay the several sums affixed to our names respectively, to such persons as shall undertake and build a court-house in said Middletown, somewhere on the highway lately opened between Mr. Henshaw's and Mr. ———." That the defendant set his name to said paper, and affixed thereto the sum of £15 lawful money.

That the plaintiffs undertook and built the court-house on said road, &c. and expended therein all the monies subscribed as aforesaid; and that they gave notice thereof to the defendant and requested of him to pay his subscription; that thereupon the defendant became liable to pay said sum of £15, and in consideration thereof assumed and promised the plaintiffs to pay to them said sum.

The defendant plead that he did not assume and promise, &c. Issue to the jury. The jury found that the defendant did assume and promise, and for the plaintiffs to recover.

The defendant offered on the trial to the jury, to introduce parol evidence to prove that when he subscribed said paper, he annexed this condition, viz. that said house should not be larger than would answer for a convenient dwelling house; which evidence the court determined to be improper to be admitted; upon which the plaintiff filed a bill of exceptions to the determination of the court.

Errors assigned—were 1st, That the parol evidence ought to have been admitted—2d, That the promise laid was void, for want of consideration, and for uncertainty as to the promisee.

Plea—nothing erroneous—and judgment, that there was nothing erroneous in the judgment complained of.

By the court—This is a written obligation, by which said Bull promised to pay £15 to the persons who should undertake and build a court house in Middletown, upon the highway lately opened between

Mr. Henshaw's and Mr. and parol evidence is not admissible to contradict, explain, or control the writing. The building of a court house at the request of the defendant was a good consideration ; and although at the time the subscription was entered into it was uncertain who would undertake to do it, the promise was made to such persons as should build it ; the committee having undertaken and built the court house have brought themselves within the description in said writing to take benefit of it, as well as though they had been expressly named in the subscription.

Richard Dickerson, administrator of John Dickerson, deceased, *vers.* Whittlesey.

WRIT of error to reverse a judgment of the county court, in an action of account, brought by said administrator against said Whittlesey, for goods and chattels received of said John deceased, in his life time.

In an action of account, auditors may find a balance for the defendant.

The cause was put to auditors, who made their return, in which they found that the defendant was accountable for goods and chattels received of said John deceased, to the amount of £41-12-6 ; they also found that the defendant had accounted to said Richard as administrator of said John, to the amount of £48-12-6, and thereupon they found that the plaintiff was in arrear, and indebted to the defendant the sum of £7, which they found for the defendant to recover of the plaintiff. A remonstrance was made to this return, by the plaintiff, that the auditors had found a balance in favor of the defendant against the plaintiff. The county court adjudged the objection in the remonstrance to be insufficient, and gave judgment for the defendant to recover of the plaintiff said seven pounds out of the effects of said deceased, in his hands.

Errors assigned were—1st, That a balance by law could not be found in favour of the defendant against

R

MIDDLESEX COUNTY, &c.

the plaintiff, in an action of account—2d, That the judgment ought to have been against the plaintiff, and his own proper personal estate.

Plea—Nothing erroneous. Judgment—Nothing erroneous.

By the court—It has been long settled as law, that auditors in an action of account may find a balance in favor of the defendant, and judgment be given for it ; as to the 2d point, the judgment was right, for it is found, that he received this balance as administrator, and it was his duty to have added it to the inventory of the deceased's estate ; and it is right and just it should be recovered out of that estate.

Samuel Ruffel *vers.* James Cornwell.

If the promisor in a note, after notice that it is assigned, and that the promisee is bankrupt, gets a discharge from the promisee, he must pay the note to the assignee.

PETITION in chancery, brought to the county court and entered in this court upon a reversal, shewing that the petitioner purchased of Nehemiah Higby, for a valuable consideration, a note given to him by said James Cornwell, dated the 20th of December, A. D. 1770, for the sum of £6 lawful money, with interest ; that said Cornwell on the first of January A. D. 1789, was duly notified by the petitioner, that said Higby had endorsed said note to him for a valuable consideration ; and that said Higby was a bankrupt, and demanded of him payment of said note. That the petitioner afterwards put said note in suit, to the county court holden at Middletown, in Middlesex county, on the first Tuesday of November A. D. 1789, which action was duly entered in said court, and continued to April county court, A. D. 1790, when and where said Cornwell produced and plead in bar of said action, a discharge in full of said note executed by said Higby, on the 13th of April A. D. 1790 ; and after the 1st of January A. D. 1789, when said notice was given to said Cornwell, by which said action was barred and the petitioner subjected to cost, although said note had never been paid ; and thereupon prayed that said



Cornwell might be decreed and ordered to pay said note and interest to the petitioner with his cost.

To which petition said Cornwell plead in abatement that said petition was insufficient, for that the petitioner had adequate remedy at law, against said Cornwell, by an action for the fraud, &c.

Judgment—That the plea in abatement was insufficient.

The court, on hearing the arguments in this case, were inclined to think that the petitioner might have an action at law for the fraud to recover his damages, but as this case was entered in this court upon a reversal, and the precedents had ever been to grant relief in chancery, in such cases, they thought it would not do to turn the petitioner round, and send him to law upon an uncertainty, as there had been no decisions of the kind. They therefore sustained the petition, and upon a hearing on the merits, granted the relief prayed for.

New-Haven County, July Term, A. D. 1794.

Candy vers. Twichel.

ACTION of the case declaring that in December A. D. 1792, the plaintiff had an attachment directed to him as constable, to serve, in favor of Mulford and Larra, against Hurd, by virtue of which he attached a certain mare, the property of said Hurd, and made a return of said attachment to the justice to whom it was made returnable, with his doings thereon endorsed. That in January A. D. 1793, he received another writ of attachment in favor of Johnson, against said Hurd, by which he also attached said mare and made return of said writ, with his doings thereon endorsed, to the justice to whom it was made returnable. That said Mulford, &c. and

Durest, fraud and imposition, may be given in evidence on the general issue.

A justice's official copies must be of something on record or on file in his office.

NEW-HAVEN COUNTY,

Johnson, each recovered a judgment against said Hurd, and took out their executions, and delivered them to the plaintiff to levy and collect. That on the 15th of January A. D. 1793, upon the request of the defendant the plaintiff delivered to him said mare, attached as aforesaid, to keep and redeliver on demand; and the defendant then gave his receipt in writing under his hand, dated said 15th of January A. D. 1793, therein acknowledging the receipt of said mare, and promising to deliver her on demand; that the plaintiff within the life of said execution repaired to the defendant, and made demand of said mare, which the defendant neglected and refused to deliver.

The defendant plead that he never did assume and promise in manner and form, &c. Issue to the jury.

The plaintiff in support of his action, produced from the justice a writing, certified and attested to be a true copy, as follows, viz. The within and foregoing is a true copy of the original writ, endorsement, and judgment; certified by ———, justice of the peace.

The defendant objected against this writing's being received as evidence, because it was not said to be a copy of any record, or of any thing on record, or on file in the justice's office; and by the court was rejected.

The defendant then offered to give in evidence, duress and imposition to avoid said receipt; this the plaintiff objected against, as being inadmissible upon the general issue.

By the court—The evidence is admissible upon the general issue, for it goes directly to disprove the obligation or receipt—Vide Kirby's reports, *Clark vs. Bray*, 237.

Enoch Thomas *vers.* Reuben Dorchester.

The issue joined, must be answered.

WRIT of error, to reverse a judgment of a justice, in an action brought by said Dorchester

against Thomas, upon a note dated the day of September, A. D. 1793, for £10. The defendant plead to the jurisdiction of the court, that said note was delivered as an escrow into the hands of certain arbitrators, to oblige him to abide their award on certain matters submitted to them, and was not given for money only.

If judgment is against a plea in abatement, it must be with a respondeas ouster.

The plaintiff replied, that said note was not delivered as an escrow, to oblige the defendant to abide the award of certain arbitrators, but was given for money only, and witnessed by two witnesses. Issue to the court.

The justice heard the evidence and gave judgment, that he had jurisdiction, there being no evidence before the court, that said note was given as an escrow to enforce the award of arbitrators—and thereupon it was considered that the plaintiff should recover, &c.

Errors assigned were—1st, That the declaration was insufficient, because it is not alleged that the note was vouched by two witnesses—2d, That the judgment is contrary to law.

Plea—Nothing erroneous. Judgment—Manifest error in the judgment complained of, in the last exception assigned for error.

By the court—The justice has not determined the issue put to him, whether the note was an escrow or not; and upon the plea in abatement, has rendered judgment in chief; whereas it ought to have been a respondeas ouster.

Ives *vers.* Beech.

ACTION of assumpsit, declaring, that at Wallingford in the state of Vermont, in the month of December A. D. 1785, the defendant requested the plaintiff to borrow of Lemuel Kingsbury, 1000 dollars in final settlement notes, which the plaintiff did and gave his own note to said Kingsbury for them, dated the day of December A. D. 1785, payable

Evidence of an express parol promise not admissible under the general issue, unless the action is bro't within three years.

the 1st of February after; and on the 17th of January A. D. 1786, he delivered said final settlement notes to the defendant; and the defendant in consideration thereof, engaged and promised the plaintiff to pay said securities to said Kingsbury, and to indemnify him against his note, given for them as aforesaid; and from all cost and damage that should accrue to him on that account. That the plaintiff had been sued by Kingsbury on his said note, and had judgment and execution against him; on which he had been imprisoned, and obliged to pay said Kingsbury £245 lawful money, in satisfaction of said execution; that the defendant had never performed his promise to the plaintiff, nor paid any of said final settlement notes to said Kingsbury, nor indemnified or saved harmless the plaintiff, &c.—Writ dated the 13th August, A. D. 1791.

The defendant plead, that he did not assume and promise in manner and form, &c. Issue to the jury.

The defendant objected against the plaintiff's introducing any parol testimony to prove an express promise, because more than three years had elapsed from the time of making the promise as stated in the declaration and the date of the plaintiff's writ.

The plaintiff insisted, that if the defendant would avail himself of this objection, he ought to have plead the statute against frauds and perjuries.

By the court—The statute is a public act, and the court are bound to take notice of it; and by it, no action shall be maintained upon any express parol promise but within three years from the making of it, the evidence therefore is not admissible.

Kelley *vers.* Riggs.

Where a specialty is lost, it is to be declared upon and the loss alleged in

WRIT of error to reverse a judgment of the county court, in an action brought by Riggs against Kelley, declaring that on the 2d of May, A. D. 1792, the plaintiff and defendant entered into a writ-

ten agreement containing mutual covenants relative to the sale and purchase of a certain house or tenement, and one acre of land; and also respecting the price of them; in and by which they bound themselves respectively in the penal sum of £15 lawful money, to abide by and perform said agreement; which agreement was set forth in the declaration; and that said written agreement was lost, and by time and accident destroyed; or that it had by some means got into the hands of the defendant; and that the plaintiff had performed every thing in said agreement on his part to be performed; and that the defendant had wholly failed of performing said agreement on his part, &c.

the declaration. In such case oyer not granted. Parol evidence admitted to prove the loss, execution, and tenor of a writing which is lost.

The defendant moved to the court for oyer of said written agreement; and the court refused to order, that oyer should be given of it.

The defendant then plead that said writing in the plaintiff's declaration alledged, was not his act and deed. Issue to the jury.

The jury found that said writing was the act and deed of the defendant, and for the plaintiff to recover.

The defendant objected against the plaintiff's producing any evidence to prove the loss of said writing, or to prove the execution and tenor of it—the court overruled the objection, and admitted the evidence; and the defendant filed a bill of exceptions against this determination of the court. After verdict the defendant moved in arrest of judgment—1st, That no profert was laid, in the declaration, of said writing—2d, That the allegation of the loss of said writing was vague and uncertain—3d, That the declaration was insufficient. The motion in arrest was ruled to be insufficient and the plaintiff had judgment.

Errors assigned—were 1st, That the county court ought to have ordered oyer to have been given of said writing—2d, That said court ought not to have admitted parol testimony, to prove the loss, execution

NEW-HAVEN COUNTY.

and tenor of said writing—3d, That they ought to have judged said motion in arrest to have been sufficient.

Plea—Nothing erroneous—and judgment, that there was nothing erroneous in the judgment complained of.

By the court—When a deed or specialty is declared upon as the foundation of the plaintiff's demand, whether there is a profert of it laid or not, the defendant is entitled to have oyer of it ; it is therefore incumbent on the plaintiff in all cases where the deed or other specialty is lost, or has got into the hands of the adverse party, to set it forth, as a reason why a profert cannot be made of it to the court ; and whenever the defendant craves oyer of the writing declared upon, where the loss is well and sufficiently alledged, it is necessary, if he would succeed in his motion, to deny the loss, or whatever other cause may be assigned, in excuse for not producing it. In this case the defendant prayed oyer generally, admitting the reasons in the declaration for not producing it to be true ; and these reasons being sufficient, the county court did right in denying the motion for oyer.

A party's having lost his written security hath not thereby lost his right ; but may resort to the next best evidence, the nature of the case will admit of, to prove and make it out ; as by a sworn copy, parol testimony, or other evidence, which goes to prove the execution and the tenor of the writing ; but this is not to be admitted, unless there is proof of the specialty's being lost, &c. The county court therefore did not err in admitting parol testimony to prove the loss, execution and tenor of said writing ; this is not to contradict or explain the writing, but to prove the existence, tenor and genuineness of a writing, which is lost. The declaration is well enough, for it is not necessary to lay a profert in any case, much less in this, where a good excuse is assigned for not doing it.

Pruden *vers.* Mark and Wm. Leavenworth, &c.

SCIRE FACIAS against them as garnishees to Doctor Carrington. The defendants plead that they were not agents, factors, trustees, attorneys, or debtors to said Doctor Carrington, at the time when the copy of the original process was left with them in service; nor had they any of his effects in their hands.

The holder of the effects of an absconding debtor, by a fraudulent conveyance, is liable as garnishee to the creditors; and his having applied the effects in payment of his own debt, doth not make him the less liable.

The case was, that Mark Leavenworth, was indebted to Dickerson, £332, for which debt Wm. Leavenworth and Isaac Baldwin the other defendants, were bound with said Mark Leavenworth: Doctor Carrington being about to fail, made over to said Mark Leavenworth by an absolute bill of sale, a vessel, and other property, to a large amount, in trust, to pay such creditors as he should order, and to account for the residue, which was a fraudulent transaction. Mark Leavenworth conveyed said vessel and goods for many as was necessary, to said Dickerson in payment of his debt, for which the other defendants were jointly bound; and said William Leavenworth transacted the business and delivered the property.

The court found that the defendants were agents, factors, trustees, &c. to said Carrington, and had his effects, &c. as the plaintiff in his declaration had alleged, to the amount of and that the plaintiff recover, &c.

And by the court—The defendants having taken benefit of the effects of said Carrington, in payment of a debt for which they were bound, made them liable to the creditors of said Carrington, to that amount; as the conveyance from Carrington to said Mark Leavenworth, was fraudulent, made in trust to defeat creditors of their just demands, and it gave no title to said property against said Carrington's creditors.

Johnson *vers.* Gunn.

ACTION of book debt. Plea—Owe Nothing.
Issue to the jury.

It was determined that the plaintiff might not be admitted to prove by his own testimony, ~~any special agreement or promise in virtue of which he would entitle himself to recover~~; but might testify to an acknowledgment of the debt made by the defendant.

Jehu Brainard, Esq. sheriff *vers.* Wilford and Williams.

An attachment served as a summons, good.

WRIT of error to reverse a judgment of the county court in an action brought by said Brainard against said Wilford and Williams, by writ of attachment.

To which the defendants plead in abatement that said writ of attachment had been no otherwise served on said Williams, than by reading it in his hearing, without attaching either his person or property.

Judgment of the county court—That the plea in abatement was sufficient, and that said writ abate.

Error assigned was—That said plea in abatement ought to have been judged insufficient.

Plea—Nothing erroneous. Judgment—Manifest error.

By the court—It is in favor of the defendant that he was not attached by his person or property, and by the writ's being read to the defendant he had legal notice of the suit, for the purposes of making preparation for trial and defence. Vide 1 vol. Root's reports, *Sears vs. Blakeley* 54, and *Embree vs. Silliman and White*, 128.

Fairfield County, August Term, A. D. 1794.

Betts *verf.* *Hilliard.*

WRIT of error to reverse a judgment of the county court, in an action brought by *Betts* against *Hilliard* ; declaring that in December A. D. 1780, he was head of a class for raising a recruit for the army, of which class the defendant was a member ; that he hired a man to enlist into the army for said class, and gave him £45 ; that the defendant's proportion was £3-1-3 lawful money, which he paid for the defendant at his special instance and request ; that said recruit was accepted ; and that thereupon the defendant became indebted and liable to pay to the plaintiff said sum of £3-1-3 lawful money, and in consideration thereof assumed and promised.

Assumpsit lies for money paid for defendant's use, though the plaintiff might have had another remedy.

Plea—Non assumpsit. Issue to the jury.

The jury found that the defendant did assume and promise, and for the plaintiff to recover.

Motion in arrest—1st, That it was by force of the statute that said class was formed, and the plaintiff as head of it, had right to hire and pay a recruit for said class, and said statute provided a remedy to recover the money paid out for said class, which the plaintiff ought to have pursued—2d, That the plaintiff's declaration was insufficient.

Judgment of the county court—That said motion in arrest was sufficient.

Error assigned—That said motion in arrest was insufficient, and ought so to have been adjudged.

Plea—Nothing erroneous. Judgment—Manifest error.

By the court—This is an action of assumpsit for money paid and advanced for the defendant, at his special instance and request ; the statute it is true gave the power to the plaintiff as head of the class, to hire and pay a recruit for them, and made it the duty of

FAIRFIELD COUNTY, &c.

the defendant to pay his proportion ; and provided a remedy against him for the same in a particular way. Yet the statute by no means excludes the equitable remedy, by action of assumpsit, to recover the money advanced for the defendant's use.

Shelton, &c. *vers.* Tomlinson.

Witnesses may be interested in one point in a case and not in another.

ACTION of ejectment for a tract of land, bounded and described in the declaration, and lying in the town of Stratford. The defendant plead that he had done the plaintiffs no wrong or disseisin. Issue to the jury.

The defendant opposed the plaintiffs recovering, on two grounds—First, That the title the plaintiffs claimed under, did not cover the land demanded—And secondly, That if it did, the defendant had gained a title by possession—and offered some of the proprietors of the common land in Stratford, as witnesses to prove the bounds ; these were objected against, because they were interested in the question ; for that they claim to hold lands against the plaintiffs, up to the same bounds, and have a suit to recover them now depending.

By the court—Members of a corporation are admitted to testify, in causes wherein they are interested from necessity ; but bounds are of public notoriety, and may be known to the other inhabitants of the town as well as to the proprietors ; and they were not admitted.

The defendant then offered them to prove his possession—the plaintiffs still objected to them, that they were interested in the question, and on that ground had been ruled out.

By the court—A witness may be interested in the question as to one point in a case, and not in another ; the proprietors are interested in the question respecting the said bounds ; but they have no interest in the question of possession, unless it was to disprove it ; and they were admitted to the point of possession only.

John Ives *vers.* Josiah Curtiss.

ACTION of debt by book, in which the defendant was described to be late of Newtown, now an absent, absconding debtor—demanding £140 damages.

A debtor who is shut up from his creditors in his own house, is an absconding debtor.

Plea in abatement, that the defendant was at the date and service of said writ and is now of said Newtown, openly and publicly about transacting his business, and not absconded—2d, That the description aforesaid was false and libellous—3d, That this was a foreign attachment, yet by it the plaintiff had attached the property of the defendant which was in his possession.

The plaintiff replied, that at the date and service of the plaintiff's writ, the defendant was an absent absconding debtor—and as to the residue of the defendant's plea, that it was insufficient. Issue to the court; upon the evidence it appeared that the defendant, at the date and service of the plaintiff's writ, had shut himself up from his creditors in his own house.

Judgment—That the defendant was an absent absconding debtor at the date and service of the plaintiff's writ; and as to the residue of said plea, that it was insufficient, and that the defendant answer over to the action.

Litchfield County, August Term, A. D. 1794.

Langdon *vers.* Chittington.

ACTION for an assault and battery and false imprisonment.

If an officer, for want of estate, levies an execution on the debtor's body, and permits him to go at

Plea—Not guilty. Issue to the jury.

The case as it appeared upon the evidence, was—the defendant was a constable of the town, and had

large upon security to return within the life of the execution, and he takes and commits him accordingly, it is not false imprisonment.

a writ of execution in his hands in favor of Ezekiel Langdon against the plaintiff, which issued from the county court, for the sum of £7-13-7 debt, and for £5-2-6 cost; dated the 31st of August A. D. 1792, and returnable in sixty days. The defendant on the first day of October A. D. 1792, levied said execution upon the body of the plaintiff, and took him thereby; and upon his request and desire suffered him to go home, upon his promise to return and deliver himself up to the defendant on the 17th of said October. On the 16th of October the defendant sent word to the plaintiff not to come on the 17th, for he could not attend to carry him to prison on that day, and that when he, said constable, wanted him he would come or send after him; on the 30th of said October, the defendant found the plaintiff from home, and took him, saying that he was his prisoner; they set out peaceably together to go to prison, and when they had got about half a mile, the plaintiff declined going to prison and made resistance, and the defendant took him by force and committed him to prison.

The question of law in this case was, whether an officer having levied an execution on the body of the debtor, and upon his request and promise to return and resign himself to be committed on the execution, within the life of it, suffers the debtor to go at large was a voluntary escape in the officer; so that it was false imprisonment in the officer to retake and commit him to prison, within the life of the execution.

The jury found a verdict in favor of the defendant, and the court accepted it.

Judges Huntington and Miller dissented from the verdict upon the principle, that by the laws of England, this was a voluntary escape in the officer; and that we had practically adopted the same ideas in this state; and that conformably to this idea our statute was express that for want of estate to satisfy the execution, the officer shall levy it on the body of the debtor and him commit to the common gaol, where he shall remain until he shall pay the debt and costs, &c.

That the design of the law, in committing debtors to gaol was to enforce a speedy payment, and for that reason a debtor taken upon execution was not bailable ; it would therefore in a great measure defeat the design of the law, if an officer might suffer a debtor taken by execution to go at large.

By the court—The laws of the state are founded in principles of justice to creditors, and of humanity to debtors ; when a creditor has recovered a judgment against his debtor, the law gives him an execution to levy and collect it of the debtor ; and the execution must be against the estate of the debtor, and against his body only, in case satisfaction cannot be obtained from his estate ; and no execution may be made returnable in a shorter time than sixty days from the date of it : and the officer has all that time to levy and collect the debt out of his estate, or to commit him to prison ; and if within the sixty days, he has done either, his return will justify him. The officer may give the debtor until the last day of the execution to pay the debt, before he levies upon his body, and commits him to prison if he pleases ; although for his own security, he may on failure of estate to be found, levy it sooner on his body and commit him to gaol. And no good reason can be given why, in such case, the officer may not, upon security given, or without, upon the request and engagement of the debtor, if he is willing to risk it, suffer the debtor to go at large about his business, until the last day of the execution ; and then commit him, as well as where the officer has forbore to levy the execution until the last day ; in the latter case he certainly may do it, and why not in the former. The debtor surely cannot complain ; the creditor cannot, for within the life of the execution he has the body of the debtor in gaol, as a pledge for his debt, which is the highest security the law can give him ; the law is satisfied, for the execution has been levied and had its full effect within the life of it, which is all the law requires. It is true indeed, that where an officer, for want of estate, has taken the debtor's body, and suffers him to go at large, either

LITCHFIELD COUNTY,

with or without security, if the debtor makes his escape, and the officer cannot retake him, so as to commit him within the life of the execution, he may be liable to the creditor for the debt, as he cannot make a return of non est inventus; so also would he be liable to the creditor in the other case, where he might have taken the body, in the life of the execution, and forbore to do it, and the debtor goes off or conceals himself, so that he cannot be taken and committed in the life of the execution, for the officer cannot make a return of non est inventus any more in this case, than in the other. Upon the same principle the law has put it in the discretion of the several county courts, to mark out certain limits around the gaols, which are called the liberties of the prison; and while the prisoners abide within those limits, they are in consideration of law within the prison; and the gaoler may with or without surety, upon the prisoner's engaging to abide a true and faithful prisoner, allow him the liberties of the prison; and if he makes his escape from thence, it will be a negligent, and not a voluntary escape in the gaoler; and he may make fresh pursuit and re-take him.

Reynolds, Elliot and Graves *vers.* Stevens.

Defendants in a quitam action if acquitted, recover their cost.

WRIT of error to reverse a judgment of a justice in a prosecution quitam, brought by said Stevens against the plaintiffs in error; upon the statute for damages done in the night season.

The defendants severally plead—Not guilty.

The justice heard the evidence, and gave judgment that the defendants were not guilty; and that said Graves recover his cost; but that said Stevens having good reason to suspect that said Reynolds and Elliot did the damage complained of, it was considered by said justice that they pay cost, taxed and allowed to be 25/ lawful money.

Errors assigned, were—1st, That the justice had no right to tax cost against said Reynolds and Elliot,

upon a quitam prosecution ; as they were found not guilty—2d, That said justice ought to have given judgment for them to have recovered their cost.

Plea—Nothing erroneous. Judgment—Manifest error, as to Reynolds and Elliot—for in a quitam prosecution, if the defendants are found not guilty, they are entitled to recover their costs of the prosecutor, the same as in a civil action,

Pettibone vers. Phelps, &c.

ACTION upon the case, declaring that in April A. D. 1793, the plaintiff had in his hands as an officer, to levy and collect, an execution in favor of against Josiah Youngs, for the sum of £8 debt and cost ; dated the 3d day of April A. D. 1793, and made returnable in 60 days ; that he levied said execution for want of estate on the body of said Youngs, and at the request of the defendants and said Youngs, he delivered him to the defendants to keep, and to return on the 26th of said April ; and that the defendants permitted said Youngs to escape, and had not delivered him, nor had the plaintiff been able since to find him. Damage £30.

Where it appears from the declaration that the matters in dispute cannot arise to £20, the court ex officio, will dismiss the cause.

This cause was appealed from the county court, and now the defendants plead in abatement of the appeal ; that the amount of the execution, the fees and legal cost and interest, were the only matters in dispute, and could all of them not exceed the sum of £20. This plea was demurred to—and judgment, that the plea was sufficient.

By the court—As no special damages are laid, none are claimed or can be recovered ; the sum of the execution and interest, the lawful fees and cost, constitute the amount of the debt and matter in demand, which do not amount to £20.

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LITCHFIELD COUNTY,

Samuel Drakesly *vers.* Thomas Roots.

Action of debt
lies for a penalty
on a decree
in chancery.

ACTION of debt for £60, declaring upon a decree in chancery for the penalty of £60 lawful money, incurred by the defendant's not performing said decree.

The defendant plead that he owed the plaintiff nothing, &c. Issue to the jury—and the jury found that the defendant did owe the plaintiff in manner and form, and found for him to recover £60, damages and cost.

The defendant moved in arrest of judgment that the declaration of the plaintiff was insufficient, for that an action of debt at law, would not lie for a penalty incurred upon a decree in chancery.

The court were clearly of opinion that the action well lay, for an action of debt lies for a sum certain, either by simple contract, by specialty, by judgment of court, by statute, or by decree in chancery; if the thing decreed to be performed, under a penalty is not performed, the penalty is incurred and becomes a debt. Judgment for the plaintiff.

Church *vers.* Smith and Harwood.

An agreement
to forbear to
sue for a time
no bar to an
action.

ACTION of debt by book, demanding £24, per writ, dated the 3d of September A. D. 1792.

The defendant plead in bar that on the 15th of March A. D. 1792, it was proposed and agreed by the plaintiff, that in consideration that the defendants would pay to him a certain order, or bill of exchange, drawn by Wait Garret upon Mr. Gibbs, which said Smith had sold and endorsed to the plaintiff, he the plaintiff would let said book debt lie, until the then next fall, viz. until the 15th of September A. D. 1792, and would take it in neat cattle; averring that the defendants had paid the plaintiff's said order.

The plaintiff replied, that the defendants plea was insufficient.

Judgment—That the defendants plea in bar was insufficient.

By the court—If the plaintiff has made the agreement alledged in the plea in bar, the defendants have their remedy against him by an action, for the breach of it, but it cannot be plead in bar of this action, it being a parol executory agreement.

Holdridge *vers.* Peletiah Allin, &c.

ACTION of debt on bond, for £116-13, dated the 8th of May A. D. 1789, which debt the plaintiff alledged the defendants had never paid.

The obligor in a bond must perform the condition if lawful and possible, or pay the penalty.

The defendants prayed oyer of the bond, and recited the condition, which was, "That whereas Shubael Crow, is indebted to Holdridge, the sum of £53-6-8 lawful money—now if said Crow shall surrender his body to said Holdridge, on the 4th of November next, at Col. Mathew Scott's, in such manner as that he shall be liable to a course at law, then this obligation shall be void." And thereupon the defendants plead that the plaintiff's declaration and matters therein contained, were insufficient in the law.

Judgment—That the declaration was sufficient—and on a hearing in damages the court gave judgment that the plaintiff recover £15 damages and his cost.

The exceptions taken to the declaration under the demurrer, were—1st, That said bond appeared to be without any good or valuable consideration, for that the plaintiff not having any legal hold of said Crow by attachment or otherwise, there was no good consideration for entering into said bond—2d, That the thing to be performed by the condition of the bond was illegal; that the bond was not in consideration of forbearance, for Crow might have been arrested the next day for this debt; and that a recovery on this bond, would not be any satisfaction of said Crow's debt, nor any bar to an action for the same; nor did it appear, that the plaintiff had said Crow any how in

LITCHFIELD COUNTY,

his power, even to institute a process of law against him, from which he was released or excused; and that it did not appear that entering into said bond was any advantage to said Crow or disadvantage to the plaintiff.

By the court—If this had been an action of assumpsit, in which a good consideration is essentially necessary to be set forth, in order to give force and validity to the promise, it would make a difference; but here is an obligation by bond to pay a certain sum of money, upon condition said Crow failed to surrender himself on the 4th of November, at Col. Scott's, so as that he should be liable to a law suit—the condition operates as a defeazance of the bond, viz. it points out certain things which if performed, the bond is defeated and the penalty saved: the condition by which the bond is controlled and may be defeated, is expressed; but the consideration, which induced the defendants to enter into it, is not expressed, nor doth it appear. The obligor in a bond, must perform the condition, if lawful and possible, or pay the penalty, let the condition be ever so trifling and insignificant.

This judgment was afterwards affirmed in the supreme court of errors.

Daniel Sherman, Esq. judge of probate *vers*, Ebenezer Talman, &c. said Ebenezer being administrator on the estate of Whitehead Gold, deceased.

Allowances made by commissioners on an insolvent estate to an administrator, may be disproved in an action on the probate bond. Parol orders of the probate not admitted in evidence.

ACTION of debt brought on the administration bond, dated the 17th of March 1781, for £500 lawful money.

The defendant prayed oyer of the bond, and recited the conditions; and then plead that said administrator had kept and performed the condition of said bond.

The plaintiff replied, that said administrator had not kept and performed the condition of said bond,

for that said administrator had not exhibited a true and perfect inventory of said Whitehead Gold's estate; that said Gold's estate being represented insolvent, said administrator exhibited to the commissioners on said estate a claim of £90, due to himself by book, and supported it by his own oath, and got it allowed, when in fact there was nothing due to him from said estate; but that he owed said deceased at the time of his death £60 lawful money, which he suppressed; and that he had received from sundry persons debts due to said deceased to the amount of £30, which he had not added to the inventory of said Gold's estate—also, five thousand feet of pine boards, worth £10; one hundred saw mill logs, worth £30, and a quantity of household furniture worth £10, he had omitted in the inventory; and had made false returns of the sums for which he sold said estate.

The defendants traversed the replication of the plaintiff, and the parties were at issue to the jury.

The defendants objected against any evidence being admitted on the part of the plaintiff, to prove that said Ebenezer owed said estate £60; and that he got £90 allowed him by the commissioners wrongfully, by his own testimony, because the report of the commissioners was returned and accepted, and if any person was aggrieved by it, he ought to have appealed from the order for accepting it.

By the court—Though an appeal might have been taken from the order for accepting the report; yet the plaintiff may prove the breach assigned in his replication in this action—And the evidence was admitted.

As to the breach assigned in the administrator's collecting debts of sundry persons to the amount of £30 which had not been added to the inventory; the defendant offered to prove in his justification certain parol orders given him by the judge of probate. These were objected against; and by the court not admitted. If the administrator had any orders

LITCHFIELD COUNTY,

from the court of probate that can justify or excuse him, they are upon the records or files of the court, and must be proved by authenticated copies.

The jury found a verdict for the plaintiff and £130 damages, which the court accepted.

Painter *vers.* Elisha Smith, Executor of Daniel Grant.

A conditional claim, against a deceased person is barred, unless exhibited within the limitation.

ACTION of account for a certain state note, for the sum of £81-15-5, payable in June A. D. 1787, the interest paid on it to June A. D. 1783; declaring that said Daniel on the 21st of January A. D. 1784, received said state note of the plaintiff and gave his receipt for it as follows, viz. "January 21st, A. D. 1784, received of George Painter one state note for £81-15-5, payable in June A. D. 1787: interest paid on it to June A. D. 1783, as a pledge for a debt due to me from said Painter, of £20 lawful money; which note I promise to return upon said Painter's paying me said £20 and the interest on said soldiers' note." And that on the 6th of June A. D. 1792, the plaintiff tendered to the defendant said £20 and the interest of said soldiers' note, the said Daniel being dead, and demanded said soldiers' note, which the defendant refused to deliver to him, and said note had never been accounted for to the plaintiff, demanding of the defendant his reasonable account and damages. Writ dated the 3d day September, A. D. 1792.

The defendant plead in bar of said action, that said Daniel Grant, having made and published his last will and testament and appointed the defendant his executor, died in A. D. 1787; and the defendant accepted said trust and caused said will to be proved and approved at the court of probate, on the 22d of August A. D. 1787; that he also procured from said court of probate an order, limiting the time for the creditors to exhibit their claims against said Grant's estate, to the term of seven months from the publi-

cation of said order, in the Hartford and Litchfield newspapers, and on the sign post in Torrington ; and that said order was published in the Hartford and Litchfield papers, and posted on the sign post in Torrington, on the 13th of September A. D. 1787 ; and the plaintiff did not exhibit said demand to the defendant within said seven months, nor until more than two years after ; and that the defendant had long since executed said trust and settled his account with the court of probate.

To this plea the plaintiff demurred.

Two questions were made in this case—1st, Whether an action of account was the proper remedy ; or an action of the case upon the written promise—and 2d, Whether this was such a claim against the estate of the said Daniel Grant, as ought to have been exhibited within the seven months.

As to the first question, it was argued that there was nothing for auditors to do, no accounts to adjust and settle. The plaintiff's claim rested upon an express written engagement, on the part of said Grant, to deliver up to him said soldiers' note, upon his paying said debt of £20 and the interest of said soldiers' note ; and upon the plaintiff's paying said debt and interest aforesaid, he was entitled to said soldiers' note, or to recover the value of it, at the time, when it ought to have been delivered up ; which was a mere matter of damage within the province of a jury, or of the court on a hearing in damages.

As to the second question—The court determined that the plaintiff had a conditional claim against said Grant, to have this note delivered up to him ; and it was within his own knowledge, option and power, whether he would perform the condition and render the claim absolute or not ; if he ever intended to do it, he ought to have exhibited his claim to the executor within the time limited ; for there is no difference between a claim of this nature, and any other as to its being exhibited within the limitation, in point of reason. The court were therefore all

LITCHFIELD COUNTY, &c.

clear upon the last point that the plea was sufficient, and gave judgment accordingly.

Scovel *vers.* Tyler.

A Petition for a new trial on the ground that the jury had mistaken the law, negatived.

PETITION for a new trial in an action of trespass—assigning as the only reason why the petitioner ought to have a new trial, that the jury found a verdict against him entirely upon a mistake of the law in the construction of a certain deed; and for which cause the court dissented from the verdict, and returned the jury to a second and third consideration; but they adhered to their erroneous opinion of the law, by means of which great wrong and injustice was done to him.

This petition was heard and negatived; upon the ground that the jury are made judges of law, on the issues put to them to try; they are therefore sworn to find a verdict according to law—and that, after the court have returned them to a second and third consideration, if they adhere to their verdict, it was a constitutional right, that the verdict should be final and conclusive without impeachment, reversal or reversal, by any other forum, let it be ever so erroneous in point of law—and further, that there were no precedents of granting new trials on account of the juries mistaking the law and finding a verdict contrary to the opinion of the court.

Pyle!

Church *vers.* Flowers.

A note which is lost must be declared upon with an averment of the loss.

ACTION of the case, declaring that the defendant in and by a certain writing or note, dated the 29th of March A. D. 1780, promised the plaintiff to pay to him, for value received, £50 by the first of November A. D. 1782, with the interest till paid; which note, by time and accident, was mislaid, or lost and destroyed—which note had never been paid, satisfied or discharged.

The defendant plead in abatement, that the allegations of the loss of said note, deprived the defendant of

the benefit of having oyer of said note, which, by law he had a right to.

Demurrer to the plea.

Judgment—That the plea was insufficient : Vide case of *Kelley vs. Riggs*, ante. determined at New-Haven, this circuit.

Hartford County, September Term, A. D. 1794.

Seymour vsf. Mitchel.

WRIT of error to reverse a judgment of the county court, in an action brought by Mitchel *vs.* Seymour ; declaring that on the first of May A. D. 1792, Norman Seymour applied to purchase a hogthead of molasses of the plaintiff on credit, and the plaintiff declined trusting him, and the defendant to induce the plaintiff to let said Norman have said hogthead of molasses, which contained one hundred and seven gallons, and was worth £20 lawful money, engaged and promised the plaintiff, that in case said Norman did not pay him for said molasses he would ; and that thereupon the plaintiff let said Norman have said hogthead of molasses on credit ; and that afterwards, viz. on the 22d day of September A. D. 1792, the defendant requested the plaintiff to forbear to sue said Norman, for one other hogthead of molasses, value £15-12-1 lawful money, which he had let him have, and in consideration thereof promised to pay for said molasses in case said Norman did not ; averring that said Norman had never paid for either of said hogheads of molasses, and that the defendant his promises aforesaid not regarding, had not performed the same. Damage £20.

To an action of assumpsit for the debt of another the statute must be plead.

The defendant demurred generally to the declaration.

HARTFORD COUNTY,

Judgment—That the declaration was sufficient, and for the plaintiff to recover £15-12-1 damages and cost.

Errors assigned—1st, That the declaration was double—2d, That both said promises laid were for the debt and duty of another, and void by the statute.

Plea—Nothing erroneous—and judgment—nothing erroneous.

By the court—Duplicity in a declaration or plea, is to be taken advantage of, only under a special demurrer. In this case the second promise laid is void for want of consideration, there being no averment that the plaintiff did forbear to sue said Norman—and as the demand in damages on both promises, is but £20, the cause was not made appealable by joining them.

As to the 2d ground of error, the promises appear in the declaration to be for the debt and duty of said Norman; but under a general demurrer the defendant cannot avail himself of the statute against frauds and perjuries; for, there may be a memorandum in writing which may be given in evidence of the promises, although not declared upon—The defendant ought, in order to have availed himself of this exception, to have plead the statute, and have denied that there was any memorandum made, in writing of said promise—Vide *Clark vs. Brown, &c.* 1 Root's reports, 77.

Israel Porter, &c. *vers.* Seabor and Shalor.

A bona fide purchaser of mortgaged premises, shall be quieted against the assignee of the mortgagee on paying his equitable part of the cost.

PETITION in chancery, shewing that on the 25th of November A. D. 1786, Levi Robbins, mortgaged to Oliver Robbins a lot of land, lying in Weathersfield, to secure the payment of £60 and the interest, which was due to said Oliver—that afterwards on the 29th day of March A. D. 1787, said Israel purchased of said Levi one acre and twenty six rods of said mortgaged premises, without any knowledge of

said mortgage, and took an absolute deed, and went immediately into possession; that said Seabor, &c. in April A. D. 1788, recovered a judgment against said Levi Robbins for £266-14-10 lawful money, and had an execution for the same, and levied it on that part of said premises which was not conveyed to said Israel, and bounding expressly upon it; and had the same appraised off upon said execution at the sum of £280, with the incumbrance of the whole of said mortgage, on which was then due £67, which left £213 to be applied in payment of their execution, after deducting what they must pay to clear said incumbrance. That the petitionees had paid said Oliver his debt and purchased in said mortgage, whereby they were become vested with the legal title to the whole of said mortgaged premises.

That said Israel had sold said acre and twenty six rods of land to Stillman, and said Stillman had sold and conveyed it to Ezekiel P. Belden—that said Oliver had recovered a judgment in ejectment, against said Levi for that part of said mortgaged premises which was not conveyed by said Levi to said Israel—and that there still remained due to the petitionees on their said execution, the sum of £53-14-10 lawful money; and that the petitionees had instituted an action of ejectment against said Ezekiel P. Belden to recover the possession of said one acre and twenty six rods, sold by said Levi to said Israel; and that said Israel was without remedy at law—praying for an injunction to be laid on said suit at law, and that the petitionees be compelled to release to said E. P. Belden, the legal title to said one acre and twenty six rods of land.

The court having heard the petition on the merits found the facts to be true, and that said one acre and twenty six rods was one third of said mortgaged premises; and ordered and decreed that upon the petitioners paying to the petitionees, one third of the difference between £67 in cash, and the land appraised off upon the execution, and one third of the interest thereon from the time of their paying up said mortgage, and their coming into the possession of the pre-

mises, and one third of the cost recovered by Oliver Robbins in the action of ejectment, and the whole of the cost in the action depending against said Ezekiel P. Belden, and the cost of this petition, amounting in the whole to £ lawful money, by the day of

That thereupon the petitionees should within one month make and execute to the said Ezekiel P. Belden a good authentic deed of release of all their right, interest and title to said one acre and twenty-six rods of land, on penalty of paying and forfeiting the sum of £ lawful money.

By the court—Israel Porter being a bona fide purchaser without notice, is to be preferred in equity to any other creditor, and even to the petitionees, who have purchased in said mortgage, and thereby got the legal title; provided he will pay his just proportion of the cost and expence incurred in clearing said incumbrance, and quieting the title in him and his assignee. The debt of £67 was a lien upon the whole mortgaged premises; and that sum being set off in hands upon said execution to pay said debt, ought to inure proportionably to the benefit of said Israel, and the expences which have been incurred more than that sum, said Israel ought to pay one third of.

Austin verſ. Hanchet.

After a person has affirmed the scandal, his adding, and that such a one told him so, may not be given in evidence, being irrelevant.

ACTION of defamation, declaring, that in a conversation about John Pomroy's loosing one hundred dollars, the defendant said, that Austin, meaning the plaintiff, had got them, and that he immediately after stepped into the stage and went to Boston privately, and paid them away; and that Austin had confessed it to Col. Loomis and Esq. Phelps, and had settled it with Pomroy and paid him, and that Lieut. Nelson told him so, and he believed it to be fact.

Plea—Not guilty. Issue to the jury.

The defendant offered said Nelson to prove that he had told him so. This was objected against, and by

the court, the evidence was not admitted. For after the defendant had affirmed the scandal, his adding that Lieut. Nelson told him so, was confirmatory of the scandal and wholly irrelevant, to either the point of the issue, or of the damages. Vide the case of *Leister w. Smith*, ante. tried at New-Haven August term, A. D. 1793, where the defendant related the story, and said that she had it from Draper. In that case the court admitted the defendant to prove that Draper had told her the story in mitigation of damages only. In this case, the general character of the plaintiff was allowed to be enquired of, as to his being a thief or not.

. *Eli Wells vers. Deming.*

ACTION upon the case, declaring that upon the request of the defendant, the plaintiff permitted the defendant to have the use and improvement of certain lands, described in the declaration, from the 1st of Jan. A. D. 1771, to the 1st of May A. D. 1782, being eleven years and four months, the defendant to pay therefor what the same should be reasonably worth; that the use and improvement of said lands were reasonably worth £150; and that the defendant in said month of May A. D. 1782, in consideration of his having had the use and improvement of said lands upon his request as aforesaid, assumed and promised to pay the plaintiff what the same were reasonably worth in a reasonable time; that the defendant had never performed his promise, nor paid for the use and improvement of said lands—Damage £150. Writ dated 2d of January A. D. 1793.

In an action for the use of lands, parol evidence is admissible.

The defendant plead that he did not assume and promise. Issue to the jury.

The defendant objected against the plaintiff's producing parol evidence to prove this promise, because it was a promise in consideration of an interest concerning lands; and the action was not commenced until more than three years had elapsed, from the time of making the contract.

HARTFORD COUNTY,

By the court—The use of land, is not an interest in land; this is an indebitatus assumpsit for a consideration received by the defendant, and executed on the part of the plaintiff, viz. the profits of the land; and to recover what they were reasonably worth; the promise is not within the statute against frauds and perjuries; and parol evidence is admissible. Vide 1 vol. Root's Reports, 233, Rogers *vs.* Tracy.

Oliver Mather *vers.* James Phelps.

Hearsay of an attorney admitted to be given in evidence against his principal.

ACTION upon a note, dated April 20th A. D. 1789, for £20 worth of neat cattle, payable the 15th of November A. D. 1790.

Plea in bar, that more than lawful interest was included and secured by said note by the corrupt agreement of said parties, &c. Issue to the jury.

The plaintiff offered evidence to prove what the son of the defendant had said respecting this transaction when acting as attorney to the defendant. This was objected against—But by the court, what the attorney to the party has said respecting what he did in the business, in behalf of his principal, may be given in evidence. Vide Perkins administrator of Mary Perkins *vs.* Samuel Bennet, ante. Fairfield County, August Term, A. D. 1793.

Pray, what precaution the son is taking!!

Barber *vers.* Eno.

Several forfeitures incurred by an executor, for not proving the will, may not be joined in one action.

A'CTION upon the statute, declaring that more than twelve months ago, viz. on the 11th of August A. D. 1788, Joseph Eno died, and left a will in which he appointed the defendant executor, of which the defendant had notice; yet he had neglected to accept or refuse said trust, or to cause said will to be proved and approved, or to inventory said estate; whereby he had forfeited by force of the statute £5 per month for every month he had neglected his duty as aforesaid, being eleven months, next before the date of the plaintiff's writ, amounting in the

whole to £55 lawful money; and to recover said penalty, one half for the use of the town, and the other for the use of the plaintiff this suit was brought.

The defendant plead, not guilty. Issue to the jury—and verdict for the plaintiff to recover £55 damages. Motion in arrest, that by the law, the plaintiff had right to sue for and recover only £5, the penalty for one month's neglect at a time, and that he could not join the forfeitures of several months in one and the same action. This motion was demurred to, and the cause continued to advise. At the superior court, February term, A. D. 1795, this motion in arrest was judged to be sufficient, and judgment was arrested.—Vide 1 vol. Root's Rep. *Chapman vs. Chapman*, 52.

This point was determined in the case of *Ebenezer Rofs vs. Joseph Baker*, 2d, upon a writ of error, at the superior court Windham, March term, A. D. 1789. Rofs sued Baker upon the statute for neglecting to accept or refuse the trust of executor to the will of Stephen Baker, for the space of two months and a half; whereby he had incurred the forfeiture of £5 per month, amounting to £12-10.

The defendant plead in abatement of the suit—That said Rofs was neither heir, legatee, or creditor, to said Stephen, and had no right to maintain said action. The county court judged the plea to be insufficient—and the defendant then plead that he was not guilty. Issue to the court.

The court found the defendant guilty, and gave judgment for the plaintiff to recover £10, the penalty for two months neglect.

Errors assigned, were—1st, That the county court ought to have adjudged the plea in abatement sufficient—2d, That the court gave judgment for £10, the penalty for two months neglect; whereas only £5 the penalty of one month could be recovered at a time—and 3dly, That the declaration was insufficient.

Plea—Nothing erroneous. Judgment—Manifest error.

WINDHAM COUNTY,

The court in their reasons say, that they made no decision on the first point, it being unnecessary, as they were all clear upon the 2d point assigned for error. The penalty was designed as an inducement to executors to do their duty ; and that but one penalty could be sued for and recovered at a time, and that it had been repeatedly so adjudged in this state, and was supported by the best law authorities.

Windham County, September Term, A. D. 1794.

Burlingham vers. Wylee and Gordon.

To take up and remand a man to another state upon a prosecution for maintenance of a bastard, is false imprisonment in both the justice and the officer.

ACTION of trespass, for an assault and battery and false imprisonment, committed on the 7th of July A. D. 1793.

The defendants severally plead that they were not guilty. Issue to the court.

The case was—Elizabeth Austin, of Hopkinton, in the state of Rhode Island, a single woman, was delivered of a bastard child, begotten in fornication, and made oath that Richard Burlingham, the plaintiff, of Voluntown, in the state of Connecticut, was the father of said child—upon which the overseers of the poor in said Hopkinton exhibited a complaint against said Burlingham to two justices of the peace, predicated upon the oath of said Elizabeth, in order to recover maintenance for said child, and obtained a warrant to apprehend him and have him before David Nickols and Moses Barber, justices of the peace, who subscribed said warrant ; and said justices endorsed on said warrant a request to the authority in Connecticut to give their assistance in apprehending said Burlingham, and in delivering him to their officer on the line of the state.

The warrant and request was brought to justice Wylee, one of the defendants, and he granted a *capias*

in compliance with said request, and directed it to either of the constables of said Voluntown, them commanding to take the body of said Burlingham, and him deliver to the officer from Hopkinton, upon the line of this state—which warrant was delivered to Thomas Gordon, constable of said Voluntown, who took the body of the plaintiff and delivered him to the said officer upon the line, who carried him before said justices in Hopkinton, where he was examined, &c. same time said complaint was withdrawn.

The court found the defendants guilty, and gave judgment for the plaintiff to recover £15 damages and his cost.

By the court—The law of the state is, that if any person or persons who have been convicted of any crime in any other state, for which facts corporal punishment might be inflicted if committed in this state, and before he or they have received punishment; or any person, &c. who having committed any such crime, and being pursued by order of authority, to bring him or them to justice, make their escape and flee into this state, such offenders may be apprehended by order of authority; and upon examination be remanded back and delivered to the authority or officer of the state, from whence such escape was made. It is therefore clear from the statute that said justice Wylee had no right by law to issue a *capias* to take the body of the plaintiff, and deliver him to the town serjeant at Hopkinton, over the line of the state, upon a prosecution to recover maintenance for a bastard child—yet if the justice's jurisdiction in matters of this nature had been general, and this had been only an erroneous exercise of his power, he would not have been liable in damages; and Gordon the constable, would also have been justified—But the jurisdiction of the justice is not general, but special, given only in two special cases; in every other case, he has no authority, any more than if he was not a justice; and this both the justice and the constable ought to have known. They are therefore both liable.

WINDHAM COUNTY,

Lemuel Parish *vers.* Peter Stanton.

If to a plea in bar which avoids a note, the plaintiff replies and traverses an immaterial point, it will be bad on a demurrer.

ERROR to reverse a judgment of the county court in an action Stanton *vs.* Parish; declaring, that the defendant by a note dated the 4th of November A. D. 1790, promised to pay the plaintiff £8 lawful money's worth of good merchantable stock, to be delivered at Stephen Snow's in Pomfret, by the 4th of December 1790, which he had not performed.

Plea in bar, that said note had conditions thereto annexed, viz. "Whereas I have this day bought of Peter Stanton, twenty acres of land, given him by his father Thomas Stanton, by will; also said Peter's share in the whole of his father's estate—and as there is danger of said estate being seized by said Peter's creditors, now if said premises are attached, and I am prevented receiving them by virtue of said purchase, then this obligation is to be void." That this note was for the balance which remained due of a larger sum, given for said purchase; and that the town of Canterbury, on the 2d of November A. D. 1790, attached said twenty acres of land, and all said Peter's share in his said father's estate, for a debt due to them from said Peter, and recovered a judgment thereon, at the county court holden at Windham, on the Tuesday of August A. D. 1791, for £53-1 damages and cost, and had execution therefor, by virtue of which said town had said twenty acres and said Peter's share in his father's estate levied upon, and set off in satisfaction of said execution, according to law, whereby the defendant had been prevented receiving or taking any benefit by said purchase.

The plaintiff replied, that the defendant did sell said twenty acres of land, and his share in his father's estate for £8, amounting in value to £20 over and besides said land attached and taken by said town of Canterbury; and for which the plaintiff had received no compensation except said note; and although said town of Canterbury did attach and take said twenty

acres, and also his share in his father's estate; that it was done by the connivance and consent of the defendant, who did agree to give up the same to said town of Canterbury, for the sum of £3; and the defendant was no otherwise prevented receiving said premises, taking the benefit thereof than by his own consent, without that, that the defendant paid or secured to the plaintiff on account of said estate or purchase any other sum than the note on which, &c. in manner and form as the defendant in his plea had alleged.

The defendant demurred to the replication—and judgment of the county court, that the reply of the plaintiff was sufficient, and that the plaintiff recover.

Error assigned—That judgment ought to have been that the plaintiff's reply was insufficient.

Plea—Nothing erroneous. Judgment—Manifest error.

The defendant's plea in bar shews, that he was prevented receiving said estate by means of the plaintiff's creditors attaching it, whereby the note was avoided by force of the condition.

The plaintiff in his reply, and as inducement to his traverse says, that said premises were taken by the defendant's connivance and consent, who did agree and give up the same to said town of Canterbury, for £3; and then closes with a traverse, without that, that the defendant paid or secured any other sum than the note on which, &c.

The defendant must have accepted this traverse, or demurred as he has done; and the traverse being immaterial, the reply is bad, and the inducement to the traverse doth not help the matter; for it admits that the estate was taken by the town of Canterbury, and does not show how the defendant could have prevented it.

Hofmer *vers.* Barret, Administrator of Oliver Barret.

Upon a different judgment being rendered, after a new trial, the money paid and interest, may be recovered back.

ACTION of assumpsit, for £24-2-5 lawful money, recovered and paid in April A. D. 1791, to said Oliver in his life time on an execution in his favor against the plaintiff. That the plaintiff had since obtained a new trial in said cause, for mispleading, and on an hearing upon the merits of said cause, recovered judgment in his favor, whereby the defendant became liable to refund said £24-2-5 recovered as aforesaid, and an action had accrued to the plaintiff to recover the same with interest.

Plea in bar, that the new trial was granted for mispleading, and on the terms, that the future cost only, should follow the final judgment.

Demurrer.—Judgment—Plea insufficient, and for the plaintiff to recover said sum of £24-2-5, and the interest from the time of the final judgment in said cause.

Amos Payne.

On a petition to perpetuate testimony, the party must be cited.

PETITION, praying to have certain depositions taken, in perpetuum memoriam rei, in a certain cause which might hereafter be instituted, and had cited no parties.

By the court—The party interested and to be affected by the depositions, must be notified.

New-London County, Sept. Term, A. D. 1794.

Warren, Administrator on the Estate of Mrs. Sarah Moor *vers.* Rogers.

Where the real estate is given to the sons charged with a payment to the daughter.

JAMES ROGERS, deceased, made his will and gave to his children equal portions of his estate, having four sons, the defendant being one, and three daughters. He gave his real estate principally to his

sons, and ordered in his will that in case his personal estate should not be sufficient to pay his debts and to make his daughters equal to his sons, that then his sons should advance out of their parts in proportion, to make the daughters equal. That the personal estate fell short £239-15 of making the daughters equal to the sons; and that each son's part was £34-5-3, and for that this action of assumpsit was brought against the defendant: and a recovery had for his proportion, being £34-5-3 lawful money, upon the ground that he accepted of the land charged with this duty.

ters, of so much as the personal estate shall fall short of making them equal to the sons, the same may be recovered in an action at law.

James Stodard and Squire Geer *vers.* John Gates.

ACTION on a charter party—wherein the plaintiffs summon John Gates to answer unto James Stodard and Squire Geer of Groton—and declare that on the 29th of January A. D. 1787, said James Stodard and company on the one part, and James Stodard of Groton, the defendant, and one Jonathan Boardman of the other part, mutually covenanted and agreed as follows, viz. "This charter party made this 29th day of January 1787, between James Stodard and company, of Groton, owners of the sloop Nancy, burden fifty-six tons, lying in the river Thames, Ranfom Rose, master, on the one part, and James Stodard of Groton, John Gates and Jonathan Boardman on the other part, witneffeth—That James Stodard and company, hath let to freight said sloop a voyage to the West-Indies, St. Croix, and elsewhere, as occasion may require, and back again to Groton, where she is to be discharged: and said Stodard and company agree with said Gates and Boardman, that said sloop shall, during said voyage, be staunch, tight and strong, &c. and that it shall be lawful for said James Stodard, Gates and Boardman, to lade on board said sloop, a full loading; and said Boardman and Gates agree to pay said Stodard and company for the freight of two-thirds of said sloop 6/ per month per ton, and so in proportion for a lon-

In an action upon a charter party, the declaration must comport with the writing declared upon; it must also appear that the money demanded had become due.

ger or shorter time, the said sloop shall be continued in their service, to be paid upon her return into the river Thames—also, to pay two-thirds of victualing and maning said sloop, and to deliver her on her return, to said owners : the pay to begin on the day of the date ; and in case she shall be lost or taken, the pay to continue till that time. To the performance of all and singular the covenants, each of said parties bind himself, heirs, &c. in the penal sum of £400—in case said sloop shall be lost, to pay to him said James Stodard, as by said writing, &c. Signed, —James Stodard, Jonathan Boardman, John Gates.”

That the plaintiffs had performed on their part, and that the defendant and Boardman on said 29th of January received said sloop and had never returned her, or paid for the hire of her as stipulated, nor paid said £400, whereby said Boardman and the defendant were indebted for the hire of said sloop £940-16, being seven years at 6s per ton per month ; and that neither said Boardman nor the defendant had kept and performed their said covenants. Damage £1000, per writ, dated 29th January, 1794.

The defendant plead that before the date of the plaintiffs' writ, he made full payment of all that was due by said charter party, for the hire of said sloop. Issue to the jury. The jury found that the defendant had not made full payment, &c. and found for the plaintiffs to recover £136-6-8 damages and cost.

The defendant moved in arrest of judgment that the plaintiffs' declaration was insufficient in the law.

Judgment—That the plaintiffs' declaration was insufficient.

And by the court—That payment was to be made upon said sloop's return into the river Thames—and in case of loss or capture the pay to continue till that time ; none of those events have yet happened—Further, the charter party is alledged to be made with James Stodard and company, and the plaintiffs are James Stodard and Squire Geer ; and there is no

averment that Squire Geer was of the company. Again, said charter party is between James Stodard and company on one part, and James Stodard, Gates and Boardman of the other part ; and it is said to be a mutual agreement ; and said writing is signed by James Stodard alone, and not by James Stodard and company, whereby it appears to be an agreement with James Stodard only, which cannot support an action brought by the company, for if it would, many actions might be brought for the same cause, and one would not be a bar to the other.

Sarah and Lydia Richardson *vers.* Zalmon Treat Richardson, administrator of Jonathan Richardson.

APPEAL from the judgment of the court of probate, appointing said Zalmon administrator on the estate of said Jonathan Richardson, in May A. D. 1792, and from all the orders and proceedings in said court relating to said Jonathan's estate.

An appeal from probate must point out in particular the decree appealed from.

A question was made, whether the appellants must not be confined to the decree of said court appointing said administrator, as no other order or decree was particularly appealed from but that.

By the court—They must be confined to that, as the only decree appealed from.

Solomon Rogers *vers.* William Moor, executor of James Rogers.

APPEAL from a judgment of the court of probate, in making an allowance to said executor of £748-15-5, and the record of the bond given by the appellant upon taking the appeal came up certified upon the copies of the appeal.

Parol testimony not admissible to contradict the record.

The appellee plead in abatement of the appeal, that said bond was taken by the clerk of said court when said court was not sitting, nor was the judge present at the time, and was taken out of court. This

plea was denied—and the appellee offered to prove that said recognizance was taken by the clerk out of court by parol testimony, which was objected against; and by the court not admitted, for this would be to impeach and contradict the record by parol testimony.

Beebe vers. Tinker.

The character of a witness introduced by the plaintiff and improved only by the defendant, may be impeached by the plaintiff.

ACTION of trespass. Plea—Not guilty. Issue to the jury.

The plaintiff called upon the defendant's son, who also was his bondsman, to be a witness; the defendant objected that he was his bondsman, but he was admitted by the court, as it was against his interest; and he was sworn; but as the point to which the plaintiff called him to testify was ruled by the court, not to be relevant to the issue, the plaintiff did not improve him, upon which the defendant asked him several questions, and his answers to them made against the plaintiff; upon which the plaintiff offered to introduce witnesses to impeach his character, which was objected against on the ground that he was the plaintiff's witness.

The court admitted the witnesses to impeach his character, on the ground that although the plaintiff introduced him, yet as the defendant only improved him, in that respect he was to be considered as the defendant's witness.

Adgate vers. Stores, &c.

An action of trespass, where the title is the principal matter in dispute, full cost is allowed, altho' the plaintiff does not recover 40 damages.

ACTION of trespass, brought for disturbing the plaintiff in his fishery on his own land, adjoining to the river Thames, and treading down his grass.

The defendants plead not guilty. Issue to the jury. The defendants set up title to the fishery.

It appeared on proof, that the defendants obstructed the plaintiff in hauling out his sein upon the beach opposite to and adjoining to his own land under an

Sagey inst?

Imp. to D. W. 1814.

Of. add. a

witness, & interrogate

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& for a new

point, & interrogate.

Thence him. Refers

idea, that they had a right to haul their scins there, in exclusion of the plaintiff.

The jury found that the defendants were guilty, and found for the plaintiff to recover five shillings damages and his cost. In this case the court taxed full cost, as the right or title to the fish place was the principal matter in dispute.

Middlesex County, December Term, A. D. 1794.

Hall *vers.* Rowley.

ACTION of the case, declaring that on the 15th of December A. D. 1787, the defendant agreed with the plaintiff to put his son, Duel Rowley, with the assent of his said son, then about sixteen years of age, an apprentice to the plaintiff to learn the clothier's trade, to serve eight and an half months in each year for the term of five years then next coming; to begin the middle of September and end the first of June annually, except, the first year, he was to begin the fifteenth of December and end the first of August. And in consideration that the plaintiff would take and instruct his said son in the trade aforesaid, the defendant promised, that his said son should serve the plaintiff the several terms aforesaid, and would clothe his said son. That he took and instructed said Duel according to said agreement, and said Duel continued in his said service until the second of February A. D. 1792, when said Duel, by the advice and approbation of the defendant left the plaintiff's service, contrary to his mind and will—to his damage £25. Writ dated 30th of January A. D. 1793.

A parol executory agreement if performed on one part is not within the statute against frauds and perjuries.

The defendant plead, non assumpsit—Issue to the jury.

The plaintiff offered to prove said agreement by parol testimony, and the defendant objected to any parol evidence being admitted, on the ground of the statute against frauds and perjuries, for that this was clearly an undertaking for the duty of another. The objection was overruled by the court, and the evidence admitted; because this was the undertaking of the defendant that his son should serve, which was an original undertaking for himself, that his son should do so. Upon the evidence it appeared, and was agreed in the trial—that said Duel came of age on said second of February A. D. 1792, when he left the plaintiff's service, and for which this action was brought. Verdict was for the plaintiff, and £12 damages.

The verdict was accepted by the court, on the ground that the agreement was executed on one part. A bill of exceptions was filed—judge Root dissented on the following reasons: An agreement that a son shall serve as an apprentice during his minority, by a father; and an agreement, that he shall serve after he arrives to the age of twenty-one years, are materially different; and for a breach of the latter agreement, this action is brought, and was not commenced until more than six years had elapsed from the time of making the agreement, which agreement was not to be performed until more than four years had elapsed from the time of making it. An agreement, that the son shall serve as an apprentice during the time of his minority, and that he shall serve six months after he arrives to full age, are distinct, independent agreements; one in the power of the father to make and enforce, and the other not; and a performance of the first, cannot be considered as a part execution of the last; and although it be a settled principle and uniformly adhered to, that an executory parol agreement, which would have been within the statute to prevent frauds and perjuries, being in no part executed, if performed and executed on one part, is not within the statute—otherwise the statute would be in many cases the means of pro-

testing, instead of preventing fraud. Yet this agreement that the son should serve after he arrived to full age, has been in no part executed. It appears to me therefore, that it is clearly within the statute. Besides, this contract is not mutual, for if the plaintiff had refused to have kept and instructed the defendant's son, after he arrived to full age, the father could not have had an action for the damage.

This judgment was afterwards reversed by the supreme court of errors, in June A. D. 1795, for the following reasons, viz.—

That the contract declared upon comes within the operation of the second paragraph of the statute of frauds and perjuries, in which it is enacted, "That no suit in law or equity shall be brought or maintained upon any contract or agreement that shall hereafter be made, and not reduced to writing as aforesaid, but within three years next after entering into or making the same;" for it appears that the contract declared upon is merely parol, and that it was made more than three years before the commencement of this suit. It is contended for the defendant in error, that the particular circumstances attending this case, appearing upon the record, are sufficient to take the case out of the statute; upon the construction it has received, by an uniform course of adjudication, both in England and in this state, in both of which countries the statute is nearly the same; and here they lay down several principles as the ground of their reasoning.—1st, That in contracts of this kind part performance is sufficient to take the contract out of the statute.—2d, That any kind of fraud practised by the defendant shall have the like effect.—3d, That where the execution of the contract commences presently and it cannot from the nature of it, be fully executed in a course of years, there the three years limitation shall not begin to run, till the right of action hath accrued—and it is contended that there was in this case a complete performance on the part of the defendant in error, and a performance on the part of the plaintiff in error, until the apprentice arrived to full age.

That there was fraud on the part of the plaintiff in error—and that the term of about five years from the date of the contract was necessary to carry it into compleat effect.

As to the first point, the principle, that part performance will take the contract out of the statute, though in a sense it may be true, yet must be understood with limitation; for if it were to be taken to be generally true, it would render the statute totally inoperative; as to all that class of parol contracts where the promise on one part is grounded on an act executed on the other, which is by far the most numerous class, and it could in no case operate, except upon parol contracts, that are mutually executory, where a promise on one part is the consideration of the promise on the other; which in the intercourse in society are comparatively few. But there seems to be no good reason, why this distinction should be made. The words of the statute, as above recited, are general and will embrace all parol contracts, except in special cases, which will hereafter be mentioned. The great principle implied in the recited paragraph is, that in proof of special contracts, attended as they commonly are, with many minute circumstances of little importance in themselves, yet material as they are connected with such contracts, the memory of man in which objects are constantly fading, cannot be depended upon longer than the period limited; and that the evil to society that might arise from the inexecution of contracts, so circumstanced, would be less, than that which would result from the endless litigation, perjury and injustice, which would be the consequence of an attempt to enforce them; but it is difficult to see why this principle will not apply with equal force, to contracts of the former description as of the latter; if the former were intended to be excepted out of the statute, the legislature must have acted very absurdly in providing in the same statute, that no suit in law or equity should be brought or maintained upon any parol agreement made in consideration of marriage, which

is a kind of contract, clearly, where the promise on one part is raised by an act executed on the other; and it has been frequently adjudged, that such promise cannot be enforced, though the party to whom the promise is made, shall have married according to the terms of the contract. So where A pays a sum of money to B, in consideration that B promises by parol to give him a deed or lease of land, here the promise of B arises from an act executed on the part of A, but it cannot be enforced; though *indebitatus assumpsit* will lie to recover back the money.

The distinction laid down in the books seems to be this; that part performance, may take the contract out of the statute, when of itself, it affords a degree of evidence of what the nature of the contract was; and with some appearance of reason, for the proof of the contract, being in such case made out in part, by prominent facts, there is less danger of imposition and injustice, than where it is made out wholly from the witnesses' recollection of the circumstances of the contract itself, which exists only in the mind, without any certain connection in the nature of things; the existing facts themselves must indeed be proved by witnesses; but as they are the objects of the senses and not merely of the understanding, the recollection will be more vivid, and if there happens a coincidence between the existing facts and the contract as proved by the witnesses, the proof will be much more satisfactory. As where the plaintiff challenges the defendant on a parol promise for a lease of lands, the plaintiff's actual possession by the delivery of the defendant, is a fact of notoriety, that of itself will go far towards proving the contract, and may justify the admission of parol testimony to make out the proof; for though this case is within the letter it is not within the mischief of the statute, or certainly not in an equal degree, as it would have been without the *fact* supposed. To apply these observations to the present case, the performance of the contract between the parties, until the apprentice arrived to full age, affords no evidence that the contract was that he should fur-

ther serve several months afterwards. The fact that he was so to serve, being contrary to common usage and custom, is in itself highly improbable, and nothing can be presumed in its favor. Had the breach alledged been, that the apprentice had left his master's service, before he had arrived to full age, then a performance of the alledged contract on both sides up to that time would afford presumptive evidence that he was to serve till he arrived to full age; because such a contract would coincide with common usage and custom; and the court in such a case, might perhaps be justified in admitting parol evidence to make out the proof within the rule; but that is not this case.

As to the second point, that fraud practised by the defendant shall take the case out of the statute; the principle is recognized in the books, and seems to be grounded on this, that it would be absurd, that a statute made expressly to prevent fraud, should so be construed as to become an engine of fraud; but it does not appear that the defendant in the original action has practised fraud in this case. It is stated indeed, in the declaration, that the apprentice, by the advice and approbation of the defendant left the plaintiff's service; and by reason thereof and the defendant's refusal to fulfil his contract with the plaintiff, and his fraudulent and deceitful conduct in the premises, the plaintiff lost, &c. But all this amounts to nothing more than a refusal to perform the contract. But something more than this is necessary; for if a refusal to perform any parol contract was evidence of fraud, then in every possible case, where an action need be brought, there would be fraud in the defendant, and so the case would be out of the statute, which doctrine would operate as a total repeal of the statute and consequently cannot be true. Some other and further fraud therefore than what may be implied in a refusal to perform the contract, is doubtless necessary; as where a man for a certain consideration agrees to sell or lease a piece of land to another, puts him in possession and encourages him to build or otherwise to improve the premises; to the intent

that on his own refusal to execute the contract he may take benefit of the other's property or labour ; this is a fraud which will subject him to a specific performance of his contract, and this is an adjudged case. But no case can be found where the refusal of the defendant has been adjudged to imply a fraud ; it is averred indeed, in express words, that the breach alleged was by means of the fraudulent and deceitful conduct of the defendant ; but as fraud is a legal inference from facts, the facts from which it is supposed to arise should be stated in the declaration, that the court may draw the proper inference from those facts, if admitted, or that the defendant might traverse them if false. Here the averment is not of facts which are traversable, but of a legal inference only which is not traversable, and therefore amounts to nothing.

As to the third particular, that where the execution of the contract commences presently, and it cannot from the nature of it be fully executed in a course of years, as in this case, there the three years limitation shall not begin to run till the right of action has accrued : It may be proper to observe ; that this construction seems to be in direct contravention of the statute, both in the letter and spirit of it. In the letter, for the words of the statute are, " That no suit, &c. shall be brought or maintained on any contract or agreement that shall hereafter be made and not reduced to writing as aforesaid, but within three years next after entering into or making the same." In the spirit, for there can be as little dependence placed on the memory of the witnesses in the proof of contracts circumstanced as those now described, after the lapse of three years, as of those which may be completely executed instantly or in a short time, and there is as much danger of imposition, perjury and injustice, in the former as in the latter case ; unless indeed in those cases where the continued execution of the contract from time to time, shall be supposed to support the memory of the witnesses, and to afford proof of the nature of the contract declared on, which brings the case under the former particular

which has been considered. Further, that the three years was to run from the time of entering into or making the contract as expressed, with respect to all parol contracts to be made after passing the statute, is evident from the different wording of the statute, in the same paragraph, with respect to contracts, heretofore made, which expressly limits to three years, next after the right of action shall accrue, or where such right of action hath accrued, to three years next after the first of June A. D. 1771. The marked distinction that is made in these cases more clearly fixes the meaning of the legislature and it would be unreasonable to understand the limitation as applying in the same manner to any contracts, made after the statute was enacted, as to those which were made before, in face of this distinction, without the strongest reason.

New-Haven County, January Term, A. D. 1795.

Amos Gilbert *vers.* Samuel Lynes.

An action at common law does not lie against a son for the support of a parent, but the remedy is upon the statute.

ACTION of debt on book. Plea—owe nothing. Issue to the Jury.

The plaintiff's book was for supporting the defendant's mother, who also was the mother of the plaintiff's wife, for several years before her death, and for her funeral charges, she being poor and impotent.

The jury found a verdict for the plaintiff, and £12 damages; from which the court dissented, except judge Huntington, and gave their opinion upon the law as follows, viz.—That the legal duty of a child to support the parent is created by statute—and although it is true, that where a statute creates a duty, and does not provide any special remedy, the common law will supply the remedy: yet in this case, the statute imposes the duty conditionally, viz. If the

relations are of sufficient ability, and in proportion to their ability ; and especially directs and empowers the county courts to be the judges of this and to administer the proper relief, upon an application made to them. Now the defendant's being liable to pay or not, and how much, depends on his ability ; and this by law is to be tried and ascertained by the county court, only. So that an action is not maintainable for it, as a debt at common law, for the statute which creates the duty provides the remedy. The jury were returned to a second and third consideration, but they adhered to their verdict. It was said that a similar remedy by applying to the county court, was provided by the statute, in certain cases of sickness —yet actions at common law had been adjudged to lie in those cases, by one town for providing for an inhabitant of another. But this is founded upon the general law of the state ; which is, that every town shall take care and provide for the maintenance of their own poor. This fixes the duty absolutely, upon the towns ; and an action at common law lies to recover pay for providing for the support of the poor of any town ; and although the statute providing in case of sickness, gives a summary remedy in certain cases, by the county court, yet it by no means takes away the remedy at common law. Vide 1 vol. Root's Rep. 60, *Town of Waterbury vs. Hurlbut*.

Thatcher vers. Dudley and his wife Lois.

ACTION of the case declaring that Daniel Tyler in May 1782, was indebted to the plaintiff £12-13 ; and drew an order on said Lois, she then being a feme sole, in words following, viz. May 24th, 1782, please to pay Samuel Thatcher £12-13 lawful money, and I will discount it on your note. — Which order the plaintiff received and presented on said 24th of May to said Lois ; which she accepted and endorsed thereon as follows :—I accept this order and promise to pay the same, and the interest by the first day of January next. Dated 24th May, 1782—

One security may be plead in bar of another, by way of accord.

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alleging a breach; and demanding £70 damages. Writ dated 11th February, 1792.

Plea in bar—that on the 13th of July A. D. 1785, it was accorded and agreed between the plaintiff and said Lois, that said Lois should deliver to the plaintiff a certain execution in her favor against Hendrick and Clark for the sum of £22-12-4, and that the plaintiff would accept the same in full satisfaction of the sum due on said order, and that in pursuance of said accord, she delivered to the plaintiff said execution; and that he accepted the same, in full satisfaction of said order and her promise endorsed thereon.

The plaintiff replied that said execution was delivered to him for another purpose, and then traversed the accord and the delivering and receiving said execution in satisfaction of said order and promise. On which the parties were at issue to the jury.

The jury found the accord and the execution of it, in the words of the plea in bar. The plaintiff made a motion in arrest, that the issue was immaterial, and that judgment ought to be rendered for the plaintiff. The question was whether a chose in action, or an execution, delivered and received, can be a satisfaction by way of accord of a certain debt and may be pleaded in bar. Continued to advise.

At the superior court, July term, 1795, judgment was, that the motion in arrest was insufficient; and that the defendants recover their cost. And by the court—It is laid down in the English authorities that one obligation, cannot be plead in bar of another, although there was an agreement it should be so. This cannot be reasonable or law in this state, in the latitude it is laid down; indeed it would be a very idle business for a man to give a new obligation for a former one, of the same tenor and sum, without any reason for doing it. But the cases are many and various, where a new obligation may be pleaded in bar of a former, by way of accord, as where an executor gives his own obligation for his testators, or a man gives an obligation for one of his own, supposed

to be lost, or where the security is bettered, or otherwise varied from the former; or as in the present case, it is a security from a third person, and a large sum is thrown in into the bargain; the plaintiff admits he received the execution, but avers it to be for another purpose.

Wrexford vers. Smith, &c.

ACTION for an assault and battery and false imprisonment.

A thief may be taken up and secured for justice.

Plea—not guilty. Issue to the court.

This case was, the plaintiff in company with two others, were travelling through Worthington and he went into a store, got some tobacco and carried it off without paying for it. The defendant pursued him for the theft by an advertisement from the owner of the store, took the plaintiff, brought him back, and he was prosecuted and convicted of the theft before justice Dunham, and punished.

By the court—When a theft is committed, the owner of the goods stolen, may pursue and take the goods and the thief; and so may any other person with authority from the owner; or even without, and tender the thief to justice, and he will be excusable provided the person taken is found guilty. Stealing is a crime so odious in itself and so destructive to the well being of society, that every good citizen ought to assist in arresting the thief in his flight.

Judgment—Defendants not guilty.

William Law vers. Hannah Hall.

ACTION, describing the defendant to be an absconding debtor of the city and state of New-York; and the officer was directed to leave a copy with Dyer White, Esq. attorney, factor, &c. of said Hannah; and also to leave a copy at her last usual

An absconding debtor may not plead in abatement that the person with whom the copy

is left, is not his agent. An officer's return must be traversed or it will be admitted to be true,

place of abode in this state; without telling where that was.

The officer made return, that he left a true and attested copy of said writ with Dyer White, Esq. agent, attorney, &c. and also at her last usual place of abode in this state, without saying where it was.

Plea in abatement—1st, That said Dyer White was not attorney and factor to said Hannah—2d, That within six months next preceding the date of said writ, she resided and dwelt in Berlin; and that no copy had been left at her last usual place of abode in Berlin, nor at her last usual place of abode, any where within this state.

Demurrer—and judgment, that the plea was insufficient.

The first exception is not admissible in this stage of the cause—And by the second, it does not appear, where said Hannah's last usual place of abode was, or whether there was any that could be so denominated in consideration of law. But if there was, the officer had returned that he had left a copy at her last place of abode and which is not to be averred against in this manner without traversing the officer's return.

Wilford *vers.* Rose.

Where the breach of a covenant is specially assigned, it must be proved. And where the proof is specially alleged to be by deed and record, aver must be given of them.

ACTION on the covenants of seisin in a deed. The plaintiff declared upon the deed, and then averred that the defendant was not seised; for that the town of Wildersburgh, in which the land lies, pursuant to a law of the state of Vermont, previous to the executing of said deed, laid a tax of £1-11 lawful money on each right in said town and appointed — Marks, collector, who levied and sold and conveyed said right by deed for the non payment of said tax, to William Williams, who sold the same by deed to — Nickols; whereby said Nickols became seised of said right, and was well seised thereof at the time of executing said deed.

The defendant prayed oyer of the deed declared upon, which was produced. He then prayed oyer of the law of the state of Vermont and of the vote of the town of Wilderburgh laying the tax and appointing the collector; and of the collector's deed to Williams, and Williams' deed to Nickols.

This was disputed by the plaintiff, who contended that he was not obliged to give oyer, only of the deed declared upon, all the rest was only matter of evidence—that the breach consists in the defendant's not being seised, at the time of executing said deed; the manner how he came not to be seised, is matter of form. The law of Vermont, the vote of the town, and the doings of the collector, which shews that the defendant was not seised, was matter of evidence and need not have been alledged in the declaration; but only generally, that the defendant was not seised; and that said Nickols was. The cause was continued to advise.

July superior court, 1795—The court ordered that oyer be given of the vote of the town, and of the deed from the collector to Williams; for the plaintiff by his declaration, had tied himself down to prove this special breach in the manner he had alledged it, which otherwise he need not.

Canday vers. Lambert.

ACTION for fencing up and obstructing a highway leading from Kimberly's to Malbone's cove, near the sound, and preventing the plaintiff from passing.—Damage £2.

Forty years uninterrupted use of a highway, evidence that it was originally laid out.

Pleas in bar, that the defendant was seised in fee and rightfully possessed of the place where the facts were done, at the time of doing the same.

Issue to the jury.—In A. D. 1699, the proprietors of New-Haven conveyed a tract of land to John Mallery, under whom the defendant claimed, and to two others; and in the grant, they covenanted with

the proprietors, that there should be good and sufficient highways, from the southwardly end of said tract to the sea, and to the mouth of Malbone's cove; and to the meadows adjoining, and from the Malbone rock. No highway had ever been laid out in this place; but people had travelled in this place across the defendant's land invariably for more than forty years; which it was contended by the plaintiff, was a practical and legal ascertainment of the highway. Verdict, that the defendant was not seized, &c. and for the plaintiff to recover 6s damages.

A question arose what judgment the court should give in this case; whether according to the law of trespass for three fold damages, or according to the law against nuisances for the penalty. Continued to advise.

July term, A. D. 1795—Judgment was for the six shillings only, for damages.

Fairfield County, January Term, A. D. 1795.

Elijah Abel, Esq. Sheriff *vers.* Byvank and Keeler.

A prisoner for debt, who has the liberties of the prison, either upon bond or his own engagement not to depart, may, if he escapes, be retaken by the goaler and committed.

ACTION of debt on bond, dated the 2d of July A. D. 1790. The condition of the bond was, that said Byvants should abide a true and faithful prisoner, upon an execution in favor of Israel Knap, against him for the sum of £138-8 lawful money debt, and £6 cost; by virtue of which he was committed to the county goal in Fairfield on the 30th of April, alledging that said Byvants did not abide a faithful prisoner, but made his escape from said goal on the day of July, A. D. 1790.

The defendants plead in bar; that on said 30th of April, said Byvants was set at liberty from his im-

prisonment on said execution by the plaintiff ; and that afterwards, some time in the month of June, he was unlawfully taken up by the plaintiff, and remanded back to prison ; and thereby compelled to give the bond on which, &c. to obtain his lawful liberty.

The plaintiff, replied that after said Byvank was committed to prison as aforesaid on said execution, the plaintiff upon the special request of said Byvank and upon his solemn promise and engagement that he would abide a true and faithful prisoner and would not depart out of the limits of said prison, did on said 30th of April aforesaid, permit and allow him to enjoy the liberties of said prison ; and on the 6th of June, said Byvank made his escape from prison against the mind and will of the plaintiff, and the plaintiff made fresh pursuit after him, retook and committed him to close confinement within said prison ; and thereupon said Byvank with said Keeler gave the bond, on which, &c. in order that he might enjoy the liberties of said prison.

The defendants demurred to the plaintiff's reply.

Judgment—That the reply of the plaintiff was sufficient.

By the court—A prisoner for debt who is allowed to enjoy the liberties of the prison yard, by the goaler, upon bond or upon his promise, that he will abide a true and faithful prisoner ; and who making his escape, may be retaken on fresh pursuit made, and be recommitted to prison ; for the escape is against the will of the goaler and is a negligent and not a voluntary escape in him. The goaler allowing the prisoners the liberty of the yard is no escape, for while they abide within the limits prescribed, they are to every intent and purpose, in the consideration of law, within the prison ; and although the goaler knows they can escape from thence, with greater facility than they could, if they were locked up within the walls of the prison, yet his taking from them security or an engagement that they will abide faithful prison-

ers, removes all presumption, that his granting them this privilege, which by law he has right to do, was with an intention that they might escape. Root's Rep. 1 vol. 72 and 127.

Hylliard *vers.* Austin Nickols.

A new trial granted for certain reasons in favor of the plaintiff in an action for the £100 penalty, brought on the statute against exporting negroes out of this state.

PETITION for a new trial, in an action brought by said Hylliard against said Nickols upon the statute entitled an act to prevent the slave trade—alleging that said Nickols at a certain time had transported out of this state into the state of Virginia, two negro children, contrary to the force and effect of said statute, whereby he had incurred the forfeiture of £100 for each; to be recovered to and for the use of the state and the plaintiff, &c. In which action the defendant was acquitted by verdict of the jury, upon the plea of not guilty.

The petition stated, that it was admitted by the defendant on said trial, that he carried said children out of this state into the state of Virginia; that he then removed into the state of Virginia for the purpose of settling there, and that he carried these children with him as a part of his family; and to prove this, Nickols produced a deposition purporting to have been taken before justice Mitchel in Virginia, in which the deponent testified that said Nickols had paid taxes in said state; that the petitioner could now prove by said justice Mitchel and certain other documents, that said deposition and the signature of said justice, was all a piece of forgery.—Further stating that said Nickols produced on said trial the deposition of ———, who testified that said Nickols' name was entered in the militia roll of said state; and that the petitioner could now prove by ———, that the entry of his name in the militia roll was made on the same day said deposition was taken, and for the purpose of obtaining said deposition. Further alleging, that he could now prove by incontestible evidence, which he knew not of at said former trial, viz.—naming the witnesses.—That said

Nickols carried said negro children into the state of Virginia for the purpose of selling them, and that in fact they were sold soon after they were carried there. Further, that he could prove by the testimony of sundry persons—naming them—That said Nickols never was taxed in said state of Virginia; that he did not remove there for the purpose of settling; but for the purpose of trafficking, and trading in land and negroes.

The respondent plead in abatement of this petition. 1st, That said action was in nature of a criminal prosecution, in which no new trial may be granted in favor of the state or of any one who prosecutes in behalf of the state—2d, That there were no sufficient reasons assigned in said petition for granting a new trial.

The petitioner replied, that the plea in abatement was insufficient. Judgment—That the plea in abatement was insufficient and that the cause proceed.

By the court—This is not a criminal prosecution, but a civil action brought on a remedial statute to recover the penalty enacted to prevent the exportation of persons, of a certain description, out of this state into any other state for the purpose of selling them. But was it a criminal prosecution, an acquittal obtained by forgery and perjury, by the procurement of the prisoner, would be set aside in favor of the public.—This statute provides a remedy against practices which go directly to deprive a certain class of persons of their rights and liberties, from the motive of making gain. A part of the penalty is given to the prosecutor; this is done to induce persons from motives of gain, who would not be otherwise wrought upon, to prosecute to effect, the violations of this law.

After a hearing on the merits a new trial was granted.



FAIRFIELD COUNTY,

Waters Pettit *vers.* Willet Seaman.

A person imprisoned for a debt contracted before he obtained his discharge upon an act of insolvency in the state of New-York, is relievable by audita querela.

AUDITA querela, complaining that the petitioner and said Seaman were, and had been for more than seventeen years last past, citizens of the state of New-York; and that while such, he became indebted to said Seaman in the sum of £346-2-3 money of New-York, for goods purchased of said Seaman in said New-York before the year A. D. 1792. That in A. D. 1792, said Seaman caused the petitioner to be attached in the state of Connecticut for said debt by writ of attachment, returnable to the county court, holden at Danbury in the county of Fairfield, on the third Tuesday of November A. D. 1792; upon which attachment the petitioner procured bail for his appearance at court; that said cause by sundry legal removes and by appeal came to the superior court, holden at Danbury on the 2d Tuesday of August A. D. 1793; at which court auditors were appointed in said cause; who made return to the superior court holden at Fairfield, on the 3d Tuesday of January A. D. 1794, in which said auditors found that the petitioner was indebted to said Seaman the sum of £346-2-3 money of New-York; which report was continued to the superior court holden at Danbury in said county on the 2d Tuesday of August A. D. 1794, when said report was accepted by said court, and judgment rendered thereon, in favor of said Seaman against the petitioner for the sum of £346-2-3 money of New-York damages, and for £10-3-10 lawful money cost; and said Seaman prayed out execution on said judgment for the sums of said debt and cost therein contained, dated the 16th of August A. D. 1794, and that by virtue of said execution, the petitioner was taken and committed to the gaol in Fairfield in said county, on the 15th day of September A. D. 1794, where he still remained a prisoner; and that he had not then, nor at any time since had one penny worth of estate wherewith to satisfy said execution and that he had taken the oath provided for poor imprisoned debtors, and was supported in prison by the said Seaman. Further alledg-

ing, that he was an insolvent debtor, and that he had in all things conformed himself to the provisions and requirements of a certain statute law of the state of New-York, made and passed on the 20th day of March A. D. 1788, entitled an act for giving relief in cases of insolvency ; and had obtained a discharge from John Lansing, jun. Esq. one of the judges of the supreme court of the state of New-York, under his hand and seal agreeably to the aforesaid statute, dated the 15th day of October A. D. 1793, the time when he made an assignment of all and singular his property to commissioners for the use and benefit of his creditors ; the statute aforesaid with all the proceedings upon it, the assignment of his property to commissioners and the discharge aforesaid, were set forth at large in said audita querela ; whereby the petitioner alledged that he became discharged from all debts due and owing by him which were contracted before the 15th of October A. D. 1793. Further alledging, that as said cause was put to auditors, and they had made up their award previous to his having obtained his discharge aforesaid ; although said return was accepted afterwards, yet he had no day in court to plead or avail himself of said discharge, praying to be heard on said complaint, and to be discharged from his imprisonment on said execution.

The defendant, said Seaman, plead in bar of said audita, that on the first of August A. D. 1793, the petitioner was justly indebted to him the sum of four pounds six shillings lawful money, for cost accrued in said action, which was not exhibited or sworn to before said judge Lansing, by the petitioner, although he well knew of the same.

To this plea a demurrer was given—and judgment, that the plea in bar was insufficient.

The court proceeded to hear said audita querela at large upon the merits, and found the facts alledged and set forth therein to be true ; and thereupon gave judgment that said Waters Pettit, the petitioner, be discharged from said execution and from his imprisonment thereon in the common gaol at said Fairfield.

By the court—The parties are, and for a long time have been both of them citizens of the state of New-York, and the debt for which the said Pettit is imprisoned, was contracted in the state of New-York, and under the laws of that state, and by which, and the judicial proceedings thereon, his person and future estate are exonerated and discharged from any and all liability for debts contracted previous to the 15th day of October A. D. 1793, the date of his discharge. The person of the petitioner being attached in this state gave jurisdiction to the courts of this state to try and give judgment in said cause, upon the idea, that the debtor was fugitive, and being attached by his person, was holden to respond the judgment. Yet the plaintiff by this acquired no greater rights over the defendant's person or property, in respect to this debt, than he would have had, had he prosecuted the action in the state of New-York.— Besides, by the constitution of the federal government, to which all the states are parties, full faith and credence is to be given, by each state to the laws, records and judicial proceedings of the other states; we are therefore bound to respect the laws and judicial proceedings of the state of New-York, respecting the inhabitants residing under their government and the contracts entered into under its laws. As to the objection made to the constitutionality of the act of the state of New-York, respecting insolvency, drawn from the constitution of the federal government having vested congress with the sole power of making general laws of bankruptcy, that never can be understood and construed, to supersede the power of the state governments, to make and to continue in force and exercise their respective insolvent laws, until congress shall exercise the powers vested in them, by making and promulgating general laws of bankruptcy through the states, which will be the supreme law of the land. This not having been done at this time, the law of the state of New-York is in force.

Litchfield County, January Term, A. D. 1795.

Oliver Wolcott, Esq. Judge of Probate *vers.*
Thomas Parmelee, Administrator on the Es-
tate of — Parmelee, deceased.

ACTION of debt upon the administration bond. An exhibit on file in the court of probate referred to by the record, may be produced in evidence.
The parties were at issue upon sundry breaches assigned in the condition of said bond; particularly, that the defendant had not exhibited a true and perfect inventory, and had not accounted for all the property belonging to said estate which had come into his hands.

The plaintiff in order to prove that the sum of nine pounds nineteen shillings was in the hands of said administrator, unaccounted for, produced the record of the court of probate; which record was, "allowed to Thomas Parmelee, administrator, £9-19 as per account on file." It was then moved that said account should be produced and read in evidence; this was objected against because said account was no part of the record.

By the court—The account may be produced and read as part and parcel of the files of the court to which the record expressly refers.

Lambert *vers.* Edward Parmelee, Moses Parmelee, Oliver Parmelee, jun. Jonathan Parmelee, and Oliver Parmelee, Esq.

ACTION of trespass, declaring that on the 4th of March A. D. 1793, the plaintiff was orderly sergeant belonging to the third company in the 13th regiment of militia, and had in his hands several lawful warrants for fines, signed by Joshua Church, captain and commanding officer of said company, against Samuel Parmelee, a soldier belonging to said company, for military delinquencies, and that after making demand of estate of said Samuel to satisfy said fines, and none being shewn or to be found; he was about Fines and warrants for military delinquencies, imposed and granted after the law is repealed under which they happened, are illegal.

LITCHFIELD COUNTY,

to levy said warrants on the body of said Samuel, and that the defendants on said 4th of March aforesaid, opposed and resisted the plaintiff in execution of his office, when attempting to levy said warrants upon the body of said Parmelee, whereby he was prevented levying the same; and the defendants did then and there with the same unlawful force, assault, beat and wound the plaintiff, and other enormities did and committed against law.

The defendants severally plead that they were not guilty. Issue to the jury.

The plaintiff produced said warrants, and they all appeared upon the face of them to be for military delinquencies, incurred before October A. D. 1792, at which time, the law was repealed under which the delinquencies took place, and a new law passed, and were all dated on the day of March A. D. 1793, and signed by Joshua Church, captain.

The defendants offered evidence to prove that said Joshua Church was not in office as captain of said company, at the date of said warrants, but was previously discharged—which the court admitted. General Chandler who gave him a discharge, had given a former deposition in this cause which was lost, a sworn copy of which was preserved, and being again applied to, had given another deposition, which referred to his former deposition as to certain facts, which he did not seem to recollect. The defendants offered the copy of said former deposition, which was sworn to, in evidence to the jury; which was objected against by the plaintiff, but admitted by the court to be read in evidence.

The cause was committed to the jury who returned their verdict finding the defendants guilty, and several damages against each.

The court dissented from the verdict and returned the jury to a second consideration; first because, if the jury found the defendants guilty, as they had done in this case, they could not assess several dama-

ges against each, but must find one entire sum against all.—Secondly, because the jury had mistaken the law and the evidence in the case, for that it appears upon the face of the warrants, that the delinquencies for which the fines were imposed took place before October A. D. 1792; and the warrants were never granted until March A. D. 1793, when they appear to be dated, and the law under which the delinquencies happened, was repealed in October A. D. 1792; and a new law passed providing different regulations with respect to imposing fines for military delinquencies; these fines were not imposed nor the warrants issued according to the existing law, nor could they be; nor according to the former law, until after the former was repealed. They could not therefore be warranted by any law—For by the repeal of any penal law, all penalties incurred by the breach of such law which had not been prosecuted to conviction and judgment, are extinguished and gone—that said warrants upon the face of them were illegal and void; that the captain had no right to grant them, nor the plaintiff to execute them. The judges not being all perfectly agreed in this opinion, the jury finally found the defendants guilty and for the plaintiff to recover twenty pounds lawful money damages and his cost.

The defendants after verdict moved in arrest of judgment, and in their motion recited all said warrants, and averred that the plaintiff had no other warrant, writ, or execution, against said Samuel—whereby it appeared that the first assault was made by the plaintiff—and that by law no judgment ought to be rendered for the plaintiff.

The motion in arrest was ruled to be insufficient.

By the court—This is no more nor less than demurring to the evidence after verdict. Besides it cannot appear to the court, but that the jury had evidence of an assault and battery independently of the battery caused by the attempt to levy the warrants, as the defendants are none of them persons against whom the plaintiff had any warrant.

Olmsted and Abigail his Wife *vers.* David Doty.

A promise implied by law is commensurate with the consideration out of which it arises—Useless averments in a declaration do not hurt what is well alleged.

ACTION of the case, declaring that on the 29th of December A. D. 1777, the defendant received of said Abigail, she being a feme sole, by the name of Abigail Judson, £166-19-9 money of New-York, for her use, to apply it in part payment of a bond given by Nathan and E. Wheeler and Samuel Judson to John Chambers, dated the 28th of December A. D. 1762, for £556; for which the defendant gave his receipt, dated the 29th of December A. D. 1777; that the defendant had not applied said sum towards the payment of said bond, but on the 8th of January A. D. 1788, did apply and convert said money to his own use, and that thereupon the defendant became liable to pay said sum to the plaintiffs with the interest of New-York, amounting to £342-2-3 in the whole; and in consideration thereof assumed and promised, &c.

The defendant prayed oyer of said receipt and recited it as follows, viz.—“Received 29th of December A. D. 1777, of Sarah Wheeler £219-12-9 York money, which I promise to pay to Peter Joy, in discharge of a bond given to John Chambers, by Nathan Wheeler Elijah Wheeler and Samuel Judson; conditioned to pay £278, and dated the 28th of December 1762; which sum together with £166-19-9 received from Abigail Judson, making in the whole £368-12-6, being the full of said bond and interest at this day; with which sum I promise to take up said bond and discharge Sarah Wheeler from any further trouble that shall arise thereon, agreeable to an award for discharging said bond, published this day by A, B and C, Arbitrators.”

And thereupon the defendant pleaded, that the plaintiffs' declaration and matters therein contained were insufficient in the law—1st, That it was not alleged when the defendant became indebted—2d, That the indebtedness accrued to the said Abigail while sole, and not to the plaintiffs—3d; That said

receipt was to Sarah Wheeler and not to said Abigail, and that the plaintiffs had no right of action thereon.

The plaintiffs joined in the demurrer—and judgment, that the declaration was sufficient.

By the court—This action is for a sum of money received of said Abigail for her use, to apply in part payment of a certain bond; which the defendant had not applied, but on the 8th of January 1778, applied the money to his own use; upon which an indebtedness and a liability to refund the money arose; which is the consideration of the implied promise and which continued as long as the consideration out of which it arose remained—and when the said Olmsted married said Abigail, he became vested with a right of action in her right. There was no need of declaring upon said receipt, which was a transaction between other parties, and could not affect what had been done between the said Abigail and the defendant—and can be considered in no other light, than as matter of evidence against the defendant, that he received the money and for what purpose received it. The action rests upon the defendant's receiving and misapplying the money.

Parmelee, &c. vers. Guthery, &c.

ACTION on an arbitration note, and verdict for the defendants.

Motion in arrest of judgment made by the plaintiffs, that Davis, one of the jurors, was nephew to two of the plaintiffs; and by law could not judge between the parties.

The defendants replied, that the plaintiffs knew of said relation when the jury were impannelled and did not give information of it nor make any challenge.

The case was continued to advise, and at August court 1795, judgment was, that the motion in arrest was insufficient. The plaintiffs are estopped from

It is no good cause for arresting judgment upon a motion of the plaintiffs, that one of the jurors was their nephew, which they knew when the jury were empannelled, but gave no information of it.

LITCHFIELD COUNTY,

excepting to the jurymen by their own act, for no man shall be permitted to take advantage of his own wrong; besides the whole reason of the law in excluding such relations from the jury is, a presumption that they will be partial in favor of their friends; this reason ceases, as applied to the plaintiffs in this case. Vide 1st vol. Root's Rep. 323, *Norwich vs. Howard*.

Hurd and Stanly, &c. *vers.* State.

A conviction before a justice for a breach of the peace, no bar to an information for a riot.

ERROR to reverse a judgment of the county court in an information of the state's attorney against Hurd, Stanly, &c. for a riot—alleging that on the 1st of March 1792, in Goshen, the said Hurd, Stanly, &c. assembled themselves together in an unlawful, riotous manner, with force and arms, with intent to break the peace; and being so assembled, did continue together for the space of eight hours, and with offensive weapons, as stones, clubs, &c. did unlawfully and riotously make an assault upon Brewin Baldwin, and did break into the house of the said Brewin Baldwin, and destroy his furniture, break and destroy his garden fence and other adjoining; and prevented people from passing the public roads; and did throw to the ground all who attempted to pass, and other enormities did, &c.—Said information dated December 1792.

To this information said Stanly plead in abatement, that he had been complained of with others, by the grand jurors, to Adino Hale, a justice of the peace, by complaint dated the 30th of April 1792; which stated that on or about the first day of March last, in said Goshen, he and others did disturb the peace of the state, by tumultuous carriage, by breaking open the doors of Brewin Baldwin's house, singing, hooting, ringing of bells, blowing horns, and other offensive instruments, near the dwelling-house of Brewin Baldwin in said Goshen, and that they continued together for some hours perpetrating the same facts, to the great disturbance of the good people of this state.

That he plead guilty to said complaint before said justice Hale; and that said justice ordered him to pay a fine of five shillings and cost. And that he had been convicted and fined for the same cause, matter and facts alledged in said information.

To this plea a demurrer was given, and judgment, that the plea was insufficient, and that he answer over to said information. Upon which he plead not guilty—Issue to the jury, and was convicted and fined.

Error assigned was—That the county court ought to have adjudged said plea in abatement sufficient, and dismissed said information.

Plea—Nothing erroneous—and judgment, that there was nothing erroneous in the judgment complained of.

By the court—If a prosecution and conviction before a justice for a simple breach of the peace, be a good plea in abatement, or bar, of an information for a riot, it would be attended with most pernicious consequences; and the most atrocious offenders, would be exculpated by punishments totally inadequate to their crimes. Vide *State vs. Peter Farrand*, 1st vol. Root's Rep. page 446.

Cadwell vs. Smith, &c. Executors of Seth Smith.

WRIT of error to reverse a judgment of the county court in an action brought by said Cadwell against said Seth Smith, Esq. for £6-14-6 allowed to him in a settlement of accounts by a mistake. Said Seth died pending the suit—the executors were cited in and plead in abatement to the jurisdiction of the court, that after said Seth's decease, the court of probate upon a representation of insolvency, appointed commissioners on his estate, and that the plaintiff exhibited said claim, with the cost in said action to the said commissioners, who upon a full hearing, disallowed said claim and the cost.

The disallowance of a claim by commissioners is conclusive as to the creditor.

The plaintiff replied, that two of said commissioners had been attornies in said cause, one for, and the other against said Cadwell, and that said Seth's estate was solvent. To which reply a demurrer was given, and judgment, that said reply was insufficient.

Error assigned was, that said reply was sufficient. Plea—Nothing erroneous; judgment nothing erroneous.

By the court—The disallowance of the plaintiff's claim by the commissioners is final and conclusive upon him. Vide Root's Rep. 1st vol. page 103, Punderfon *vs.* Avery.

Mills *vers.* St. John and Wife.

Necessaries advanced by a guardian to his ward, may be charged as a debt, and recovered in an action on book.

ACTION on book for articles delivered and for boarding and schooling of the wife when a minor, under the guardianship of the plaintiff.

The question made to the court was, whether such articles delivered by a guardian to his ward while a minor, could be charged on book and sued for as a debt.

By the court—A minor is liable for necessaries supplied by his guardian, to be paid out of his estate; and if the guardian has no estate of the minor in his hands, wherewith to reimburse himself, he may charge them, and recover what is reasonable.

Zechariah Fuller *vers.* Reed.

When it appears upon the face of the declaration that the matters in dispute do not exceed £20, the appeal must abate.

ACCTION of the case, declaring that the plaintiff delivered to the defendant on the 18th of June 1794, a horse for a person unknown to the plaintiff, to ride to New-York and return; of the value of £16 and a saddle and bridle worth £4—that said horse and saddle were never returned to him; to his damage £22. Writ dated 1st November, 1794.

Plea in abatement of the appeal, that the matters and things in dispute did not exceed £20 in value.

Judgment—That the appeal abate.

By the court—The plaintiff has set his own value upon his horse and saddle and bridle, which amounts only to £20, and has laid no foundation in his declaration to recover special damages.

Hartford County, February Term, A. D. 1795.

Brown, Executor of Ephraim Brown *versus* Reed.

WRIT of error to reverse a judgment of a justice in an action brought by said Reed *vs.* said Executors, for forty one shillings lawful money, which he delivered to said deceased in January A. D. 1791, to pay over to Samuel P. Lord, on a note given by said Reed and Nathaniel Gillet; alledging that said deceased having received said money for the purpose aforesaid, never did pay the same to said Samuel P. Lord; and that an action had accrued to the plaintiff to recover the same of the defendant—damage, &c. Writ dated 10th of June A. D. 1794.

A creditor must exhibit his claim to the executor of a deceased debtor, within the time limited by the court of probate.

The defendant plead in bar, that six months were allowed by the court of probate from the 28th of November A. D. 1791, for the creditors of the said Ephraim Brown to exhibit their claims to his executor, and that the plaintiff never exhibited this claim to said executor within the time limited aforesaid.

The plaintiff demurred to the plea in bar, and the justice gave judgment, that the plea in bar was insufficient, and for the plaintiff to recover.

Error assigned, that said justice ought to have adjudged said plea in bar to have been sufficient.

Plea—Nothing erroneous. Judgment—Manifest error.

By the court—Nothing can be clearer than that this demand ought to have been exhibited to the exe-

HARTFORD COUNTY,

cutor within the time limited, and that as it was not, it is clearly barred by the statute of limitations.

The heirs of Daniel Sheldon *vers.* John Robins and the heirs of Isaac Sheldon.

Surplusage in a petition to be rejected.

PETITION in chancery, to which the respondents plead in abatement—that there is and was a material variance between the copy left in service at the time when left, and the original petition; for that in the petition said Daniel Sheldon is said to have died in August A. D. 1772, and an administration on his estate to have been taken out in November A. D. 1772, whereas in said copy, administration is said to have been taken out in February A. D. 1772, which was before his death.

Demurrer to the plea; and judgment, that the plea was insufficient—February may well enough be considered as surplusage and be rejected.

Hun *vers.* Higby.

A note to pay £60 in cattle, by a certain day, or to pay £50 in money, is a note for £50 in money, if the cattle are not paid.

ACTION on a note dated the 4th of April A. D. 1792, wherein the defendant promised the plaintiff to pay to him sixty pounds lawful money's worth of neat cattle by the 15th of October A. D. 1793, at Becket's, or to pay fifty pounds lawful money at the time and place aforesaid, with the interest.

The defendant plead in bar, that on the 25th day of January A. D. 1794, he offered and tendered to the plaintiff on said note the sum of £55-10 lawful money, which was in full of the sum due on said note and the interest; which the plaintiff refused.

The plaintiff demurred to the plea in bar, and the court gave judgment that the plea in bar was sufficient. The only question in this case was, whether as the cattle were not delivered, the debt in the note was fifty or sixty pounds.

By the court—The debt is £50, and although the defendant had the privilege of paying it in neat cattle on paying ten pounds more if he chose, yet as he had not done that, the plaintiff's demand is fifty pounds, and this is what he has agreed in the note the defendant should pay, in case he did not pay the cattle. Vide 1st vol. Root's Rep. page 493, Hall *vs.* —.

Pinney vers. Pinney.

ACTION declaring that he loaned to the defendant £170-3 in state securities on the 15th of September 1789, to be repaid in February after; that in consideration thereof, the defendant assumed and promised to pay said state securities in February A. D. 1790; which he never performed. Damage £200. Writ dated the 13th of March A. D. 1793.

A parol promise for a consideration executed on the part of the promisee is not within the statute against frauds and perjuries.

The defendant plead that he did not assume and promise. Issue to the jury.

The defendant objected against any parol testimony being admitted, because this was an agreement and promise within the statute for the prevention of frauds and perjuries.

By the court—This is a contract and promise upon a consideration executed on the part of the plaintiff, and not within the statute—and the evidence was admitted, and verdict for the plaintiff; upon which a bill of exceptions was filed, and upon a writ of error, judgment was affirmed in the supreme court of errors, June A. D. 1795.

Job Williams, &c. and George Hubbard, Children and Heirs of Ruth Cowl and Rhoda Cowl, daughters of Job Cowl, deceased *vers.* Moses Dickerfon.

ACTION of ejectment to recover three pieces of land, described in the declaration—alleging that at a certain time they were seized, and afterward

A devise of one third part of the devisors estate to his

grand-son, and the other two thirds to his daughters, with a proviso, "that in case the grand-son dies before he arrives to the age of 21 years, or before he has any heirs of his body, then the estate given to him shall go to said daughters," vests the grand-son with the estate if he arrives to the age of 21 years; though he dies without heirs of his body.—The dying without heirs, is to be understood, to relate to the time before he arrives to the age of 21 years.

disseised by the defendant, and demanded said three pieces of land with damages and cost.

The defendant plead in bar—That on the 12th of December A. D. 1765, Job Cowl was seised of the demanded premises, and made and published his last will and testament as follows, viz. after other devises; "Item, I give and bequeath unto my grand-son Seth Dickerson, son of my daughter Lydia deceased, wife of Moses Dickerson, the one third part of all my estate, both real and personal, computing what I gave to my daughter Lydia deceased, in her life time, to make up his third part of my estate.—Item, I give unto my two daughters now living, Ruth Cowl and Rhoda Cowl, and to their heirs forever, two thirds of all my estate both real and personal to be equally divided between them.—My will further is, provided, that if my above named grand-son Seth Dickerson, shall and does die before he arrives to the age of 21 years, or, before he has any heirs of his body; that then the estate above given him, shall return to my two daughters, Ruth and Rhoda Cowl afore said, and be their estate, to be equally divided between them."—That on the 2d of February A. D. 1779, said Job Cowl died—upon which said will was proved and approved on the 15th of March A. D. 1779; and in April A. D. 1779, distribution was made by order of the court of probate, of the demanded premises to said Seth Dickerson, as his third part of said Job Cowl's estate, whereby he became well seised in his own right in fee, and thereinto entered and was possessed, and so thereof continued to be seised and possessed, until he arrived to the age of 21 years, which was on the 26th of February A. D. 1782—and on the 11th of August A. D. 1783, said Seth, for a valuable consideration, by deed conveyed the third piece of land mentioned in the plaintiffs' declaration to the defendant—of which the defendant thereupon became well seised and possessed.—That on the 25th of June A. D. 1785, said Seth made his will and therein and thereby devised, the other two parts of the demanded premises to the defendant, his father Moses Dickerson y

and on the 26th of June A. D. 1785, said Seth died; and his will was duly proved and approved.—That before said 1st day of January A. D. 1790, the defendant was well seised of the demanded premises in his own right in fee; and that said Seth was the only child of said Lydia, and the said Ruth and Rhoda Cowl, were the only surviving children of said Job Cowl at the time of making and publishing his said will—and were the only heirs at law of said Job Cowl, at the time of his death—which is the same entry and ouster complained of in the plaintiffs' declaration.

The plaintiffs replied, that said Seth died before he had any heirs of his body—that the plaintiffs were the children and heirs of said Ruth and Rhoda—and that said Ruth died on the 10th of April A. D. 1783, and said Rhoda on the 28th of May A. D. 1785, and left no issue but the plaintiffs.

The defendant demurred to the plaintiffs' reply.—The case was argued and continued to advise.

The question was, what estate said Seth Dickerson took by the will of Job Cowl—whether the condition upon which this estate should go to the daughters, is to be taken disjunctively—and his dying before he had heirs of his body, was to be understood to be without restriction in point of time, or to be restricted to the time before he should arrive to the age of twenty-one—or whether the estate given to said Seth was not an estate tail by force of the words, "heirs of his body."

At the superior court, September term, 1795, judgment was given that the plaintiffs' reply was insufficient.

By the court—The question in this case is, what estate Seth Dickerson the grand-son took by the will of Job Cowl. The devise is one third part of all his estate both real and personal, &c. The testator had a fee simple, consequently a fee simple is devised to Seth the grand-son. Then comes the proviso, "that

if my grand-son Seth shall and doth die before he arrives to the age of 21 years, or, before he has any heirs of his body, then the estate shall go to the daughters."—In the construction of wills the intention of the testator is to govern, provided such intent is consistent with the policy of the law, and they are so to be construed as to give every clause in the will effect, if that can be done. Now the condition in the proviso is, to divest an estate before given in the will to Seth the grand-son, and pass it to the daughters, if he shall die before 21, or before he has heirs, &c. If by dying before he has heirs, is to be taken unlimitedly in point of time; then the first clause, viz. if he dies before twenty-one, will be perfectly senseless and idle, unless we suppose that the testator meant that the estate should go over to the daughters if he, said Seth, died before twenty-one, although he should have heirs, &c. which is too absurd an idea to be admitted.—Seth the grand-son was the son of a deceased daughter, and equally the object of the testator's bounty, as the surviving daughters.—The testator contemplating that the grand-son might die before he arrived to the age of 21 years, also, that he might have heirs of his body before he arrived to that age; and provided that if he died before he arrived to twenty-one years of age, or before he had heirs, &c. the estate should go over—But in case either of these events took place, viz. that he had heirs of his body, or arrived to the age of twenty-one, it should not go over. This appears to be obviously the intent of the testator; and this construction will give effect to every clause in the will, and is perfectly consistent with the rules of the law.

The case of *Holms vs. Williams and Crary*, 1st vol. Root's Rep. page 332, was determined in the superior court upon the same principle of construction adopted in this case. The words of the will were, "I give to my grand-son, William Wheeler, the farm I now live on with the buildings, to him and his heirs and assigns forever, upon condition he pays to my grand-daughter Hannah £200 old tenor bills, when

he arrives at full age ;—but in case my grand-son William dies without issue lawfully begotten of his body, then I give said houses and lands to my six sons in law and grand-daughter Hannah.” The court determined, that the dying without issue, &c. in this case, referred to the time before he arrived to the age of twenty-one years.

Tolland County, February Term, A. D. 1795.

Josiah Converse, Administrator of Eleanor Converse *vers.* Stephen Moulton.

ACTION on note, dated 25th of December A. D. 1775, for £40 and on interest. On which note was this entry—“N. B. The above note is given on account of a note my honored father Converse gave to Col. Brattle,” and was witnessed by the same witnesses that witnessed that note.

A parol condition not admitted to be proved, to control a note.

The defendant plead in bar, that said note was given to indemnify said Eleanor and said estate against a note Josiah Converse, then deceased, had given to Col. Brattle, and to be void upon condition she and said estate were indemnified, which condition was entered upon the note in the following words, viz. “N. B. The above note is given on account of a note my honored father Converse gave to Col. Brattle”—and then averred that said Eleanor and said estate had been every way indemnified and saved harmless from said note.

To this plea a demurrer was given, and judgment, plea insufficient.

By the court—The entry upon the note shews the consideration for which it was given, but does not contain a condition, that said note should be void in case said Eleanor, &c. should be indemnified against

TOLLAND COUNTY,

the note to Brattle, as plead ; and no parol evidence would be admitted by the court, to explain the written entry made upon the back of the note ; or to prove the parol condition alledged in the defendant's plea ; as the entry on the note referred to in the plea, contains no such condition ; but is, that this note was in confideration of a note given by his father to Col. Brattle, for him.

Robert Paul *vers.* County of Tolland.

If the gaol is sufficient and a prisoner is enabled to escape by means of external force only, the county are not liable.

ACTION for the escape of one Lawson, who was committed to gaol on a prosecution quitam for horse stealing ; who made his escape through the insufficiency of the goal, as was alledged, on the 25th of December 1793.

Plea—That he did not escape through the insufficiency of the gaol, but by means of external force and assistance given from without, by persons unknown : on which issue was joined to the court.—The evidence was that the gaol was sufficient to have held the prisoner, and that he could not have got out, unless he had had assistance from some persons without.

Judgment—That he did not escape through the insufficiency of said gaol, but by means of external force ; and that the county recover their cost.

John Daniels *vers.* Solomon Alvord and Phineas Talcott.

If a bond of defazance was to have been given to a deed which is by fraud or otherwise evaded, the grantor will be entitled to him not on-
against the
but his
in case
he had notice.

PETITION in chancery, shewing that on the 31st of October A. D. 1786, the petitioner wanted to borrow about £80 money—that said Alvord proposed to lend him £80 in soldiers' notes ; and for security, to take a deed of about 40 acres of land worth £200—and to give the petitioner a bond to reconvey said land in two years, upon the petitioner's paying him said £80 and interest in neat cattle, to which proposal the petitioner agreed, and received said £80 in soldiers' notes and gave an absolute deed of said forty

acres of land ; and did not then wait to have said bond, but relied on the petitionee, said Alvord, that he would make out the bond forthwith, according to his agreement ;—and that said Alvord to defraud the petitioner had ever neglected and refused to give to the petitioner said bond of defeazance, although, the same had been often requested ; and that on the day of last, he offered and tendered to said Alvord said £80 with the interest and demanded of him a deed of said forty acres of land, which he refused to give—further alledging, that said Alverd had sold and conveyed said forty acres of land to Phineas Talcott, and thereupon prayed, that the court would take his case into consideration, and to search out the truth of the facts by examining said Alvord upon oath, and to order and decree a reconveyance to be made to him of said land, upon his paying what should be found to be equitable and just.

The respondents plead in abatement of this petition—1st, That said Phineas Talcott had sold said land to Alexander M^cClean, and said M^cClean had sold it to ——— Hammond, neither of whom were made a party to this petition—2d, That said agreement to give said bond of defeazance was a parol agreement, and within the statute against frauds and perjuries—and 3dly, That a purchaser ought not to be affected by such a private agreement between the petitioner and said Alvord.

Judgment of the court—That the plea in abatement was insufficient, and that the respondents answer over to the petition.

By the court—If it appears that there are persons who will be affected by the decree, and ought to be made parties, upon application to the court, they will order it to be done. As to the second exception in abatement, the petition grounds itself upon the fraud, in refusing the bond of defeazance, after the petitioner had given an absolute deed of said land, contrary to said Alvord's agreement—As to the third exception, it would have weight in the case of a bona fide pur-

chafer without notice; but that is not stated in the exception, to be this case.

Afterwards, at the superior court, February term, A. D. 1796, the court heard said petition on the merits, and found the facts therein alledged to be true, which appeared from the frank discovery of said Alvord.—The court further found that said Alvord informed said Talcott most fully of all the facts relating to said agreement, and said bond of defeazance at the time of said bargain, and received of said Talcott, as a consideration for said land, the sum of principal and interest due to him from said Daniels only, and gave to said Talcott a quit claim of all his right to said lands, with an engagement on the part of said Talcott, that upon said Daniels' paying him said debt principal and interest, he would release to him said land according to the original agreement between said Alvord and Daniels.—And thereupon the court ordered and decreed, that, upon said Daniels' paying to said Talcott said sum of £80 and interest by a certain time, the said Talcott should procure, and cause said Daniels, by a proper deed or deeds of release, to be revested with the title to said forty acres of land, in as full and ample a manner, as he was before he gave said deed to said Alvord.

Davis Rofs *vers.* John Bates.

An amendment to a declaration not allowed, which changes the nature of the action, without any apparent reason.

ACTION for prosecuting the plaintiff falsely and maliciously, before justice Harvey, for a felony of which the plaintiff averred he was innocent, and from which he had been legally acquitted.

Plea—Not guilty. Issue to the court.

The plaintiff moved for liberty to amend his declaration, agreeably to the statute of amendment, lately made, by inserting in his declaration, that the defendant wickedly conspired with said justice Harvey, to prosecute him falsely, &c. instead of the allegation in the declaration, that the defendant did prosecute him falsely, &c.

By the court—This is not an amendment contemplated by the statute. The plaintiff has got a good declaration, and well adapted to his case; and it would be admitting the plaintiff to alter the nature of his action, from an action of the case for a malicious prosecution, to an action of conspiracy without any apparent reason, unless it be to prevent justice Harvey from being a witness.

The amendment was not allowed.

Windham County, March Term, A. D. 1795.

Town of Hampton vers. Town of Windham.

ACTION of indebitatus assumpsit generally for money had and received.

Plea—Non assumpsit. Issue to the jury.

The plaintiffs went into a particular lengthy stating of facts, by which they meant to make out their case which the defendants could not possibly have had any notice of by the declaration; but as this was not objected to by the defendants, it was passed without any remarks from the court, which statement was as follows, viz. That John Cates, in 1697, gave by will 100 acres of land for the use of a school in the town of Windham—that said town of Windham then consisted of but one ecclesiastical society—that the select-men of the town, leased out said hundred acres for sixty bushels of corn or thirty bushels of wheat, or thirteen ounces of silver a year; and had ever received the rents into the town treasury; and had ever paid to the plaintiffs their proportion of said rents after their being made an ecclesiastical society, until A. D. 1786, when they were set off from said town of Windham, and were incorporated into a town by themselves—that the act of assembly incorporating them, enacts, that they should receive of the school

A party not compellable to join in a demurrer to parol evidence.

A general action of indebitatus assumpsit cannot be maintained by evidence, which would support a special action of indebitatus assumpsit.

Where the plaintiffs' right to recover depends upon a written instrument, the instrument must be produced, or in case of loss, clear and precise evidence of its contents.

WINDHAM COUNTY,

and other public monies belonging to the town of Windham, in proportion to their list; which was agreed to be nearly one third. The will of said Cates was not produced.

The defendants drew up what they supposed to be a state of the evidence in the case and offered a demurrer to it, which the plaintiffs refused to join in. The defendants moved the court, that they would order a state of the evidence to be drawn up, and that the plaintiffs should be compelled to join in a demurrer to the evidence.

By the court—Parol evidence may be demurred to if the parties agree; but neither party is compellable to join in a demurrer to parol evidence. Where the proof is in writing, the case is otherwise. A demurrer to the evidence admits all the facts and inferences of fact, which a jury could possibly find, and refers the question of law arising upon the facts to the court, instead of having it decided by the jury. It is the province of the jury to make inferences of facts from the evidence; and if the parties do not agree in them, the jury must find them; but inferences of law from the facts, are to be referred to the court.—See the case of *Bulkley vs. Clark*, New-London, September term, A. D. 1793, ante.

The jury found a verdict in favor of the plaintiffs contrary to the evidence in the opinion of the court.

There being four judges only present, and they equally divided in opinion: Judges Sturges and Miller observed, that although this was a general action of indebitatus assumpsit, and the proof to support it was derived from a great number of facts and particular circumstances, which were stated by the plaintiffs, and not objected against by the defendants, the evidence had been let in, and was now to be considered and weighed by the jury; and as the jury must have found this fact, viz. that these monies were public monies belonging to the town of Windham; it follows, then, by the act of incorporation, that the plaintiffs were entitled to one third part of them; or

the whole they could not say that the jury had done wrong, and accepted the verdict.

Judges Adams and Root, dissented from the verdict, and stated their reasons, as follows—This being a general action of indebitatus assumpsit for money had and received, could not be turned into a special action of assumpsit, to surprise the defendants, and prevent its being a bar to another action for the same cause. In the case of *Snow vs. Chapman*, adjudged at Windham superior court, March term, A. D. 1794, ante. which was a general action of indebitatus assumpsit—plea, non assumpsit—issue to the court; the proof depended upon a number of particular facts, which not being objected to, was let in; and the court found that the defendant did not assume and promise, and gave it as the reason expressly, that a general indebitatus assumpsit did not lie and was not to be supported by proving special facts and circumstances.—The will of John Cates, by which it is claimed that this estate was given, is not produced, nor any good reason assigned why it is not, nor is there any evidence which shews what this gift was, to what or whose use it was given, which leaves the plaintiffs' right to these monies altogether uncertain.—The plaintiffs having received their proportion of these monies whilst they continued to be an ecclesiastical society in said town, is no evidence that they belonged to the town, but rather that they were given for the use of the ecclesiastical societies; but their having been refused ever since A. D. 1786, when the plaintiffs became incorporated into a distinct town, is evidence as far as such a practice will go, of an understanding, that said monies did not belong to the town of Windham, otherwise no reason can be assigned why the plaintiffs did not receive their proportion of them, as well as of the other monies, which belonged to said town of Windham, agreeable to the act of incorporation.

The jury returned to a second consideration, and found a verdict for the defendants, which the court accepted.

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WINDHAM COUNTY,

Ainsworth *vers.* Jareb Dyer, Willoughby and Chapman.

In an action upon a note given by a company, and the defendants plead in abatement, that another person belonged to the company who is not sued—it must appear by the plea that he was of the company when the note was executed.—A joint debtor living out of the state, need not be served with notice.

ACTION on note, declaring that on the 22d of December A. D. 1793, the defendants were traders in company, under the firm of Dyer, Willoughby & Co. that said Dyer for a valuable consideration received for the use of said company, did for himself and company in and by a certain writing or note under his hand by him well executed, by the name and firm of Dyer, Willoughby and Chapman, promise the plaintiff to pay to him for value received, the sum of £32-13 lawful money, by the 1st of January then next, with lawful interest. Said note dated the 22d of December A. D. 1793.—And thereupon the defendants became liable to pay, and in consideration thereof assumed and promised to pay the plaintiff £32-13 by the 1st of January aforesaid, with the interest, which they had not performed, &c.

The defendants plead in abatement—1st, That Asahel Ainsworth of—in the state of Rhode Island, was a partner in said company and was not joined in said suit—2d, That said Chapman was described to be late of Tolland in this state, now of Hopkinton in the county of Kent and state of Rhode Island, and no copy had been left at his last usual place of abode in said Tolland—3d, That said Chapman was not of Hopkinton in the county of Kent, as described, but of Hopkinton in the county of Washington, &c.

The plaintiff replied, that if the said Asahel was a partner, he was a secret partner, never made public, and of whom the plaintiff knew not, and contracted with the defendants only. Also, that he belonged to another state, and was not amenable to the laws of this state.

Demurrer. Judgment—That the reply was sufficient, upon the ground that the plea did not say that said Asahel was a partner on said 22d of December 1793, when said note was executed. As to said Chapman, he was described to be a joint debtor, re-

siding out of this state, and for any want of notice or misdescription, he will have his remedy upon the statute.

William Lyon *vers.* Benjamin Lyon.

APPPEAL from an order of probate, accepting a return of commissioners on the estate of Caleb Lyon, for the following reasons, viz. Benjamin Lyon, executor of Caleb Lyon, deceased, represented said estate to be insolvent, and had commissioners appointed; one of whom was Theophilus Chandler, a creditor to the said Caleb, and had allowed him to the amount of four shillings; said Chandler was agreed upon before the judge, not knowing of his claim.—William Lyon, the appellant, was a large creditor to said Caleb, and stated that a great part of his claim was disallowed unjustly. The appellant appealed from the judgment of the probate in accepting the return of said commissioners, on account of said Chandler's not being a fit person to be a commissioner, as he was a creditor to said estate, and by which report said estate was not made insolvent. These facts were denied, and the court found the facts to be true, and the judgment of the probate was disaffirmed.

A man who is a creditor may not be a commissioner on an insolvent estate.

It is of importance that commissioners be disinterested men, as their report concludes the creditors—and let the interest be ever so small, it disqualifies, for there is no other rule by which the line can be drawn.

A question was made, whether the appeal ought not to have been taken from the judgment of the probate appointing said Chandler a commissioner.

By the court—An appeal from the order of probate would undoubtedly have been proper, provided the interest could have been proved. But a return of commissioners, who by law cannot judge between the creditors and the estate of the deceased, is no legal return, and ought to have been set aside by the judge of probate; and if accepted, may and ought to be appealed from. Root's Rep. 1st vol. 205, *Barker vs. Mary Wales*.

Basset *vers.* Gaius Davis.

If substantial matter in bar is plead, and not traversed or avoided, tho' the jury find a verdict for the plaintiff—the court will on motion, give judgment for the defendant.

ACTION demanding partition of certain lands and £30 damages—declaring that the defendant on the 24th of July, A. D. 1792, bargained and sold to the plaintiff one half of a certain tract of land, by deed dated said 24th July, acknowledged and recorded, described in the declaration ; whereby the plaintiff became tenant in common with the defendant of one half of said tract of land and had right to have the same set out and aparted to him in severalty, &c.

Plea in bar—that the defendant long before and at the date of said deed, and ever since, was and is non compos mentis and disordered in his mind ; and was an inhabitant of the town of Providence in the state of Rhode Island ; and in consequence thereof, the town council in said Providence, appointed his wife, and two other persons his guardians and overseers in March A. D. 1786 ; which appointment had been continued ever since. The appointment was recited at large, and was conformable to the laws of the state of Rhode Island ; whereby the defendant was rendered legally incapable of executing said deed without the consent of his guardians ; and that said deed was given without the consent of his guardians aforesaid ; and thereupon that the plaintiff did not hold in manner and proportion as stated, and the defendant ought not to be compelled to make partition as demanded.

The plaintiff replied, that he ought not to be barred, without that, that at the date of said deed the defendant was an inhabitant of the town of Providence and under the guardianship of his wife, &c. and incapable of making and executing said deed, and under the care and guardianship of guardians legally appointed, who had right to control him in his contracts, and thereupon that said deed was not void.

The defendant rejoined and affirmed over his plea in bar. Issue to the jury. The jury found that at the time of making and executing the deed declared



upon, the defendant was not under the guardianship and control of guardians, nor an inhabitant of the town of Providence, nor non compos mentis, nor legally incapable to make and execute said deed, in manner and form as the defendant had alledged; and that he make partition in manner and form as the plaintiff had demanded, and found for the plaintiff to recover £4 damages and cost.

Motion in arrest—1st, That the declaration and deed declared upon were insufficient—2d, That the plaintiff in his reply admitted said Gaius was non compos mentis, and traversed only, his belonging to Providence and his being under a guardian—3d, That the verdict was insufficient in that it did not pursue the issue, and found facts contrary to what was admitted by the pleadings.

The motion in arrest was judged to be sufficient.

By the court—The allegation in the defendant's plea in bar is, that before and at the time of executing said deed, the defendant was non compos mentis, which is the only material fact alledged in the defendant's plea. This fact the plaintiff has not traversed, and by not traversing it has admitted it to be true. It was laid out of the issue, and no evidence was needed to prove it, and the jury might as well have found any other fact not put in issue, contrary to the admission of the parties, as to have found that the defendant was not non compos mentis—This fact being admitted by the pleadings, all the other facts put in issue and found by the jury, are very immaterial.

Chaffee and Wife, &c. heirs of the body of Hannah Walker, daughter of Uriah Hosmer, *vers.*
Dodge, Whitmore, and their Wives, heirs of Robert Prince.

ACTION of ejectment, for a piece of land, containing eighty acres, described in the declaration.

A grant to a person and the heirs of her bo-

dy lawfully begotten, to have and to hold to her and her heirs forever—is a fee simple.

Plea—no wrong or diffisin. Issue to the jury.

The plaintiff's title was a deed from Uriah Hofmer to his daughter Hannah Walker, of the demanded premises, dated the 30th of July, A. D. 1762. The deed was thus expressed, "I give and grant unto "Hannah Walker, and to her heirs begotten of her "body, the following tract of land, bounded and "described as follows, viz."—here follows a description of the land—"to have and to hold the above "granted premises to her and to her heirs forever," with covenants of seisin and warranty. Said Hannah afterwards married and had heirs of her body, and with her husband conveyed these lands to Robert Prince in fee, the defendants being the heirs of said Robert Prince; said deed dated in A. D. 1772. The defendants admitted themselves to be in possession.

Verdict for the defendants, and accepted by the court.

Judges Sturges and Miller, dissented from the verdict, upon the ground that a fee-tail was granted in the premises of the deed, and could not be altered or enlarged by the habendum—at most it was a fee-tail with a fee-simple expectant. The question was, what estate said Hannah took by the deed from her father Uriah Hofmer, whether a fee simple, or only an estate in tail, if the former, the verdict was right, if the latter, then the verdict ought to be for the plaintiffs to recover.

Reasons of the court—In the construction of deeds the intent of the parties is to govern, if consistent with the rules of the law; and their intent is to be collected from the words of the deed; and in doing of this every part of the deed is to be taken into consideration, and such construction is to be made as will give the greatest effect to the intent; and where doubtful expressions are used, or contradictory clauses introduced, which may render the meaning ambiguous, that construction is to be preferred which is most in favour of the grantee—entailments soon became in-

tolerable in Great Britain, and perpetuities were odious, and fictions were introduced to dock them, as fines and common recoveries. It is against the policy of this country to establish such a kind of tenure.

What is called the premises in a deed, usually expresses the consideration, describes the parties, and the thing granted; and sometimes the interest or estate in the land granted, and contains the grant itself.

The habendum most frequently describes the interest in the land granted, or the quality and quantity of estate the grantee is to have and hold. The habendum may enlarge, but cannot lessen or narrow the estate in the grant, for no person can take back what he has once granted.

The terms used in the premises in this deed are to her and her heirs begotten of her body; these are words of limitation, and standing alone create an estate tail. The words in the habendum, to have and to hold to her and her heirs forever, are also words of limitation, and pass a fee simple. This deed must be construed to convey a fee-tail, or a fee simple, or both, viz. a fee-tail with a fee simple expectant. Had the words been transposed, and the grant been to her and her heirs in the premises, and to have and to hold to her and the heirs of her body, in the habendum, it would have been construed to be a fee-tail in England, and the latter words would be taken as explanatory of the word heirs in the premises; but it is evident this construction is in favour of entailments, and lessens the estate granted in the premises, which ought not to be done upon any construction—Hannah the daughter did not take an estate tail merely, for the grantor has parted with all his estate, which was a fee simple, and by the English law such a conveyance would create an estate tail, with a fee simple expectant. 2 Blac. Com. 298, and 2 Bac. Abt. 260, with the references. By the statute of this state, all entailed estates shall be fee simple estates, in the issue of the first donee; now a fee simple cannot be limited

WINDHAM COUNTY,

upon or alter a fee simple in a deed ; the fee simple expectant cannot vest, until there is a failure of the issue in tail ; and the possibility of issue in tail continues during the life of the tenant in tail—it could not vest therefore till after her death, and if she leaves issue of her body, they take the fee simple immediately upon her death by form of the statute. Such an estate can scarcely be said to have an existence in this state, and it would be to very little purpose if it could. But to construe the estate in Hannah to be a fee simple, is most favourable to the grantee, and avoids every ambiguity and difficulty ; the estate granted in the premises is explained and enlarged in the habendum which the grantor might well do, and the whole fee passes from him to his daughter.

Samuel Dorrance *vers.* Shubael Simons.

In an action for a nuisance in erecting a mill and dam, the defendant may give in evidence a licence from the plaintiff.

ACTION of the case, declaring that on the 20th of November 1793, the plaintiff was possessed of a certain tract of land described in the declaration, with a stream of water running through it into the defendant's land, and that the defendant in A. D. 1793, erected a mill dam on his own land below the plaintiff's, and overflowed his land.

Plea—not guilty. Issue to the jury.

The defendant offered and was allowed by the court to give in evidence a licence, viz. that he had liberty from the plaintiff to erect said mill and dam at said place, and to raise his dam the height it was raised. The plaintiff objected against the admission of this evidence the statute against frauds and perjuries. But the court said it was a fraud in the plaintiff to attempt to make a private nuisance of that which was erected by his own licence.

Penelopin Miller *vers.* Grosvenor.

Under the plea of owe nothing in an action of book debt, the

ACTION of debt by book, for £112. Writ dated 5th August 1794. The defendant prayedoyer of the plaintiff's book, which was Grosve-

nor Dr. to labor for you at housework 748 weeks, viz. from March A. D. 1778, to August A. D. 1792, at 3/. per week, £112-4, and then plead the statute of limitation in bar of all the accounts antecedent to the 5th August A. D. 1788, which plea was demurred to. The court gave no judgment upon the demurrer, but ordered the general issue to be entered, as under that issue the statute may be given in evidence, which was accordingly done.

statute of limitations may be given in evidence.

Bundy vers. Sabin.

PETITION in chancery, shewing that Noah Sabin, died in A. D. 1757, leaving a plentiful estate, which had descended to his heirs. That Hezekiah Sabin, John Williams, and Mary Sabin, were his administrators; that said Noah's personal estate was insolvent, and that said administrators pursuant to liberty obtained from the general assembly in May 1758, to sell £105-16-3 of the real estate of said Noah, sold a piece of land to — Eaton, with covenants of warranty and seisin. In June 1760 said Eaton in like manner sold said land to Wheeton in 1770, and said Wheeton to the petitioner in May 1772; that said administrators omitted to make return of their doings to the probate agreeably to the orders of said court, whereby said title was rendered defective, and the heirs of said Noah had since, viz. in 1790, evicted the petitioner of said land on account of said defect in the title, and had sold said land to — Cargel, who had notice of the petitioner's claim to said land; that said Mary Sabin survived the other two administrators and died leaving no estate, executor or administrator—that the petitioner was without remedy at law, that said Eaton and Wheeton were both bankrupts. Praying to be quieted in said estate, and that the court would order and decree that the heirs of said Noah and said Cargel under suitable penalties, release said land to the petitioner; and that said heirs pay to him the cost he had been put to in defending said title.

Chancery will relieve against defects in a legal title.

WINDHAM COUNTY,

The respondents plead in abatement in nature of a demurrer. And judgment—That the plea was insufficient—and in March A. D. 1796 this petition was heard on the merits and granted, and a decree passed accordingly.

By the court—the authority of the Administrators to sell, in this case is unquestionable, and the deed they gave to said Eaton was in execution of their power ; and for a good and valuable consideration. The title to the land therefore in equity and good conscience, vested in said Eaton and passed from him to the petitioner. But it has been adjudged in the superior court, that the legal title to this land did not vest in said Eaton by force of said deed from said administrators, because said administrators were ordered to make return of their doings to the court of probate, yet never made any return of this sale to said Eaton ; what the opinion of the court would be upon this question, was it judicially before them as a court of law, at this time, is not very material ; the point has been decided at law by court and jury, that the petitioner had no remedy at law, and a mistake of the jury as to the law, has not been considered a ground for a new trial. The petitioner has lost his land unjustly, and cannot be said that he has any, much less an adequate remedy at law. The only question is whether the petitioner shall have his land restored to him, to which he has a just and equitable right, and of which he has been deprived at law, through an omission of said administrators, to make return of said sale to the court of probate, to which the petitioner was not privy, and over whom he had no power, and for which he is totally remediless at law ; and about which there cannot be a particle of doubt. See 1 vol. Root's Rep. p. 105, *Gay vs. Adams &c. and Mitford's Chancery*, p. 104, 112, 118, and 111 ; *Atkins* 740. This judgment was afterwards upon a writ of error affirmed in the supreme court of errors.

Ruffel *verf.* Cafe.

ACTION for a breach of covenant in a deed, declaring that the defendant in and by a certain deed in February A. D. 1794, fold and conveyed to the plaintiff 100 acres of land in Lebanon village, and covenanted that the defendant was well seised of said granted premises, and that the same was free from all incumbrances, averring that — Skiff had right to turn a brook of water off from said land on to his own; also that he had right to the use of eight rods of land for a barn-yard for the space of twelve years; that said granted premises were not free from incumbrances, and the defendant had broken his covenant in said deed—damage £100. The defendant plead not guilty. Issue to the court.

A deed of a certain tract of land, with a reference to another deed for the bounds, with a covenant that it is clear of all incumbrances, will subject the covenantor to damages, if it is incumbered by any reservations in the deed referred to.

The court found that the defendant was guilty and gave judgment for the plaintiff to recover.

The case was the defendant derived his title to the lands from Skiff, who by deed sold and conveyed said land to Jonathan Gould by deed, as follows, viz. “a certain tract of land lying in Lebanon village, containing about 100 acres, bounded as follows, viz.” describes the bounds with covenants of seisin and warranty, reserving in said deed the privilege of turning a water course from a brook on said land, on to a mowing lot adjacent, as had been done in time passed; also the use of eight rods of land, part of said premises, for a barn-yard for the term of twelve years. Said Gould by deed sold and conveyed said lands to Francis Antram. The deed from said Gould to Antram was, “of that tract of land lying in Lebanon village, which I purchased of Skiff by deed dated, &c. reference thereto being had for a more particular description,” &c. with covenants of seisin and warranty. Antram sold and conveyed said lands by deed to said Cafe in the same manner with reference to Gould’s deed for the description of the land granted; which also was with covenants of warranty and seisin and the defendant’s deed to the plaintiff was, “I give and grant to Josiah Ruffel, his heirs, &c. forever, a

“ certain farm or tract of land containing by estimation
“ one hundred acres, be the same more or less, with
“ the buildings thereon standing, lying in the village
“ and is the whole of that farm or tract of land, I
“ bought of Francis Antram by deed dated 15th June,
“ A. D. 1789, reference to said deed being had for
“ a more particular description of said farm,” and
covenants that he was well seized of the above bargained premises, and that the same was free of all incumbrances, &c. It was urged by the defendant that as all the deeds refer to the deed from Skiff to Gould for the description of the thing granted, the subsequent deeds passed no interest but what was contained in that deed: And that the covenants in the deed would extend to nothing but the bargained premises; and the bargained premises, by the reference in the defendant’s deed, and which was the same in all the other deeds back to Skiff’s deed to Gould, was the same, as in Skiff’s deed and was as though the defendant’s deed had been in terms the same as Skiff’s.

By the court—When we take up the deed from the defendant to the plaintiff, and see what the description is there; which is, of a certain farm containing by estimation one hundred acres, more or less, with the buildings standing thereon, lying in the village, and conveys the whole of that farm or tract of land the defendant bought of Francis Antram by deed dated 15th of June, A. D. 1789, reference to said deed being had for a more particular description of said farm, with all the privileges and appurtenances, &c. with a covenant that it was free of all incumbrances; and that neither in the defendant’s deed nor in any of the deeds which refer to Skiff’s deed, was mention made of any exception or reservation in that deed which would call the attention of the purchaser to expect or look for any; but it was described to be the same farm containing one hundred acres, with a reference to that deed for a more particular description of the boundaries. The language then of the deed from the defendant was this: I sell you a farm of one hundred acres with the buildings, lying in the village,

the same that Antram sold to me by deed, &c. to which I refer for the bounds ; and covenant that it is clear of all incumbrances.

Allen vers. Lyon.

ACTION for a nuisance, in erecting a stone wall across a public road, whereby the plaintiff was obstructed in passing, and shut up from the high way.

It is a nuisance to shut up an old highway—and the person prejudiced by it may have an action.

The defendant plead not guilty. Issue to the court.

This was an old public highway leading by the plaintiff's house and land, and the only highway that run by them. In A. D. 1792, upon application made to the county court to have said road altered and laid out eastward of where the old road run, the county court appointed a committee who made the alteration, and made report thereof, and that the same should be in lieu of the old road, which report was accepted, and said alteration established by the court, August term, 1793. The defendant through whose land the old road run fenced it up, by means thereof the plaintiff had no road to get from his house, but was entirely shut up. The court found the defendant guilty, and gave judgment for the plaintiff to recover £6 damages and his cost.

By the court—The statute authorises the county courts to lay out new highways, or to alter old ones leading from town to town ; but no authority is given to extinguish an old highway thereby to deprive a citizen of the benefit of travelling in it, and in going to and from his dwelling house.

New-London County, March Term, A. D. 1795.

Judith Bill vers. Town of Lyme.

ACTION upon the statute, declaring that in September 1792, the select men of said town were notified in writing, subscribed by two witnesses, that

Double damages given for an injury suf-

ferred by the deficiency of a bridge.

the great bridge in said town over river, was defective, that said town notwithstanding neglected to repair said bridge sufficiently ; and that in March A. D. 1793, in riding over said bridge, the plaintiff's horse broke through, by means of the insufficiency of said bridge, and threw her off and wounded her.

Plea—Not guilty. Issue to the jury.

The jury found the defendants guilty and for the plaintiff to recover £15 damages. And the court thereupon gave judgment that the plaintiff recover £30 lawful money, the double damages. Vide Swift *vs.* Town of Kent, where double damages were given upon the statute, where there was no notice in writing given of the deficiency of the bridge. 1 vol. Root's Reports, 448.

Sarah Waters *vers.* Waterman, &c. Select men of Bozrah.

Select men liable in damages for appointing an overseer to a person without just cause.

ACTION of the case, for maliciously and without just cause, appointing an overseer over the plaintiff on the 13th of March A. D. 1793, to continue without limitation in point of time, whereby the plaintiff was disabled to transact her affairs or to make any contract.

The defendants plead not guilty. Issue to the jury.

The county court upon application to them had vacated the appointment, and this action was for the damages the plaintiff had sustained, and the jury found that the defendants were guilty, and £15 damages, which was accepted by the court, and judgment accordingly. The appointment was illegal in both form and substance.

Burton *vers.* Benjamin Butler.

An agreement to discharge a vessel in ten days after her arrival at a port,

ACTION on a written agreement, in which Burton agreed to deliver all the lumber, boards and plank, on board the schooner Betsey and Hannah, at the island of Bermuda, as captain Freeman should



direct, dangers of the seas excepted, said Butler paying fifteen dollars per thousand at board measure, on delivery, according to the usual and customary survey and inspection in said island; and said Butler agreed to pay to the plaintiff or his order, on delivery, for all the merchantable lumber on board said schooner, at the island of Bermuda, fifteen dollars per thousand board measure, according to the customary survey in said island; also all the charges at the custom house for said vessel and cargo, till discharged from that port; and to discharge her in ten days after her arrival at said port, and to pay ten dollars per day for every day she should be detained more than ten days. This action was brought for the demurrage of seven days at said island.

is to be computed from the time she has got fairly into port to discharge her cargo.

Plea—That the defendant had fully kept and performed his covenants, &c. Issue to the jury.

The case was, the vessel arrived at Bermuda on Saturday the 14th of September, on Monday the 16th she got to the wharf, and began to unload, every thing was settled but the demurrage of the schooner; she was detained from said 14th of September until the 30th, when she was discharged, which included three Sundays and two rainy days—and whether they were to be excluded or not was the question. The jury found a verdict for the plaintiff, and £15 damages, which the court accepted.

Mary Sidleman *vers.* Boardman.

ACTION of the case, declaring that her husband John Sidleman, was a mariner on board the ship Confederacy, during the war, and died on board said ship; that at his death there was found due to him on settlement of his wages £50. That on the 3d of November A. D. 1792, the defendant applied to the plaintiff to give him a power to apply for, and receive the wages due as aforesaid to her said husband, and to induce her to do it, he did on said 3d of November A. D. 1792, in and by a certain writing, promise the plaintiff to pay to her one half of the wages

An express promise to pay a sum of money, cannot be discharged by the promisor's doing something else.

due said John which he might obtain when collected; and that the defendant had collected more than £50 which was due to said John, yet had paid no part to the plaintiff.

Plea in abatement—That having prayed oyer of said writing, it was as follows, viz. “ November 3d, “ A. D. 1792, then received orders to go to Judge “ Hillhouse, to take a letter of administration on John “ Sidleman’s estate, late deceased, which I promise to “ return to his widow Mary, one half of what I may “ obtain of his wages when collected,” and that there was a material variance between the writing declared upon and the writing shewn on oyer.

This plea was demurred to, and judgment, that the plea in abatement was insufficient. And at the superior court, September term, the defendant having recited said writing, plead in bar, that he had fully performed his promise therein contained, for that he had caused the estate of said John to be inventoried, including the sum received for his wages as aforesaid, and that the debts and charges due from said John’s estate surmounted his whole estate, including said wages—that he had paid said debts and charges and made return thereof to the court of probate, which was accepted and allowed.

The plaintiff demurred to the plea—and judgment, that the plea was insufficient and for the plaintiff to recover.

By the court—The writing declared upon, contains an express promise to pay to the plaintiff one half of her husband’s wages. The defendant’s paying this money to the creditors of said John, was not a performance of his promise to the plaintiff, nor any good excuse for his not performing.

Whipple *vers.* M^cClure.

Chancery will
relieve against
an unconsciona-

PETITION in chancery, brought by the conservator of said Whipple, shewing that in September A. D. 1783, said Whipple being a very weak man as

to his mental powers, and easily imposed upon ; also, was an intemperate man, which greatly increased his liability to imposition, and to be defrauded—that said M^cClure, taking advantage of the weakness and intemperance of the petitioner, got him intoxicated and sold to him an old house with about three rods of land for £300, which was not worth more £60, and gave the petitioner a deed of said house, &c. and took the said Whipple's note for said £300 ; that in March A. D. 1784, said Whipple paid to said M^cClure £180 towards said sum and gave a new note for the sum remaining, viz: £120, and gave a mortgage of said house, &c. to secure the payment of said £120—that the said M^cClure, taking advantage of said Whipple's necessity, weakness and incapacity, in September A. D. 1789, procured a decree to be passed foreclosing said Whipple of his equity of redemption in said mortgaged premises, and had since sold the same to Lynde M^cCurdy for £60 lawful money ; praying by his conservator, that said contract might be set aside as unconscionable ; and that the respondent be decreed to refund to the petitioner said £180 paid as aforesaid.

At the superior court, March term A. D. 1794, the said M^cClure plead in abatement of said petition—1st, That the petitioner had adequate remedy at law—2^d That said petition was insufficient to found any decree in chancery upon. The court overruled the plea in abatement, and judged the petition to be sufficient ; and thereupon appointed a committee to inquire into the facts alledged in the petition and to make report thereof with their opinion thereon, which committee made report, as follows, viz. “ That on “ the 3d of September, A. D. 1783, said Whipple “ bought of said M^cClure an old house and about three “ or four rods of ground, worth not more than £150 “ lawful money for which he gave £300 lawful money ; towards which he paid £180 and gave his “ note for the remaining sum of £120 on interest. “ That said Whipple then and for some time before, “ and ever since, hath been addicted to the excessive

" use of spirituous liquors, and prone to intoxication
 " at all seasons, and was and is a common drunkard ;
 " that said Whipple, at the time of said contract was,
 " and is a person of a weak mind, and naturally be-
 " low the level of mankind in general, in point of
 " judgment and other mental abilities, and that at the
 " time of making said contract, he was tenant in the
 " house of said M^cClure ; and that no person was pres-
 " ent, or consulted with upon said bargain, until a
 " justice was called to take the acknowledgment of
 " said deed, when he found said M^cClure was there
 " with said Whipple and his family, with a bottle of
 " spirits and glasses on the table, but do not find that
 " said Whipple was then intoxicated. That on the
 " 5th of March, A. D. 1784, said Whipple re-con-
 " veyed said premises to said M^cClure, and gave said
 " note for £120 ; and said M^cClure gave said Whip-
 " ple a bond to re-convey to him said premises upon
 " his paying said £120 and the interest, by the first of
 " March, A. D. 1787 ; that said Whipple failed to
 " pay said £120 and interest by the 1st of March, A.
 " D. 1787, and said M^cClure preferred his petition
 " to the superior court in September, A. D. 1789,
 " praying for a foreclosure of the equity of redem-
 " tion in said mortgaged premises, and obtained a de-
 " cree foreclosing said Whipple of his equity of re-
 " demption in said premises ; and took possession
 " thereof ; and in A. D. 1793, he sold said premises
 " to Lynde M^cCurdy for £60 lawful money. The
 " committee further find that in November A. D.
 " 1783, said M^cClure recovered two judgments
 " against said Whipple for rents amounting to £13
 " which was satisfied by being levied on said premises,
 " also that said M^cClure paid about £7-16-2 for taxes
 " which said Whipple owed, and upon the facts sta-
 " ted in said report the committee give it as their opin-
 " ion that the petitioner ought to recover of said M^c
 " Clure what he paid for said premises over £150
 " lawful money ; also, the £60 which said M^cClure
 " received of said M^cCurdy for said premises, deduc-
 " ting therefrom the aforesaid sums of £13 and
 " £7-6-2."

This report was accepted by the court and a decree passed accordingly that said Whipple should recover the sum of £ for the balances due as aforesaid, and his cost, and that execution issue for the same.

By the court—It is very clear in this case, that the said McClure has got a large sum of money from the petitioner, which in equity and good conscience he has no right to have and hold ; it is also as clear that he got it by taking an unconscionable advantage of the petitioner's weakness and incapacity, arising from a natural debility of intellects, increased by a vicious habit of intemperance. The great disparity between the price given for the house, &c. and its just value, is strong evidence that there was much imposition and fraud practised in obtaining this bargain.

The only doubt in the minds of the court was, not in respect to the equity of the case, but whether a special action of indebitatus assumpsit, would not lie at law to recover this money. But as there were no precedents of this kind, which had taken place, the principle being unsettled and the circumstances difficult to investigate at law, the court decreed to the petitioner that justice which was due to him. This judgment was afterwards, upon a writ of error, reversed in the supreme court of errors.

Sarah Richardson, &c. daughters and heirs of Amos Richardson, deceased, and the grand children of Jonathan Richardson, deceased, *vers.* Zalmon Treat Richardson, administrator on the estate of the said Jonathan.

APPPEAL from several decrees and orders of the court of probate, viz. from the decree appointing said Zalmon administrator, and in accepting the inventory of said Jonathan's estate ; also in appointing commissioners on said estate, and in accepting their return, whereby said estate was found to be insolvent ; and from the orders given for the sale of said

Persons no wife interested or affected by the settlement of an estate, have no right to appeal from any orders of.

the court of probate respecting its settlement.

Jonathan's estate, and accepting the return made of the sale of said estate—for the following reasons, viz. that said Jonathan died above twenty years ago, and left no estate, but had conveyed it all away in his life time by deeds of bargain and sale, for valuable considerations; part of which was conveyed to their father the said Amos, by deed of sale for a valuable consideration; that said administrator had sold the same lands conveyed to their said father as aforesaid, for the payment of said debts, allowed against said Jonathan's estate, the greater part of which were allowed in favour of said administrator, and were as follows, viz. "the sum of £88-2-1, due on execution, and "the sum of £182-4-1, due on note to said administrator—to Nathaniel Minor, £5-3-2, to Josiah Denison, 2d, £9-3, to Josiah Denison, £1-15-4—"total, £286-7-8," when in fact there was nothing due to said administrator on said execution or note.

The appellee moved that said appeal might be dismissed, because it did not appear that the appellants had any interest in the allowance or disallowance of said debts, or that the deed to their father Amos would be at all affected by the doings of said administrator.

By the court—The cause must be dismissed—had the appellants shewn themselves to have been heirs at law, or legatees of said Jonathan, or that the deed to their father Amos, was a voluntary conveyance, and would be affected by the allowance of said debts, or the sale by the administrator, they would have entitled themselves to the appeal, but as their father was a purchaser from the said Jonathan, for a valuable consideration, it did not appear how they were interested or could be affected by the doings of the court of probate or of said administrator.

Nathaniel Morgan *vers.* Nathaniel Minor, &c.
Managers of the Stonington Lottery.

Parol evidence allowed in favor of the plaintiff to

ACTION, declaring that the plaintiff purchased a ticket in said lottery, No. 40, which entitled him to such prize as should be drawn against that



number, subject to a deduction of 8 per cent.—That a three thousand dollar prize was drawn against his number, whereby the defendants became liable to pay said prize with the deduction aforesaid, which they had never paid.

prove that his number came out against the prize he claimed. If a lottery is not drawn according to the scheme, the fortunate adventurers are not entitled to recover.

The defendants plead not guilty. Issue to the jury.

The plaintiff offered to prove by parol evidence, that the prize of 3,000 dollars was drawn against his number, this was objected to. By the court, he accounts are kept by the managers, and are all in the hands of the defendants; the plaintiff must prove his demand by the best evidence in his power, which in this case, may be by parol. The defendant proved that the 3,000 dollar prize was drawn against his number. On the part of the defendants they proved that by mistake said lottery was not drawn according to the scheme, for that there were three numbers which were not in the box; and as they finished drawing, there were left a blank, and a prize, and but one number against them. No. 560 drew a blank, and afterwards it drew 500 dollars—that therefore the plaintiff was not entitled to this action, because the lottery had not been drawn according to the scheme. As the jury came in, the plaintiff withdrew his action.

John Pitts *vers.* John Clark.

ACTION of the case for the rents and profits of four-fifths of a tract of land belonging to the plaintiff, and which had been occupied by the defendant for six years past, to pay what it was reasonably worth, &c. which was ten pounds per year, which the defendant assumed and promised to pay.

In an action for the rents and profits of land taken by execution, parol evidence not admitted to prove, that the execution by which the land was taken, had been paid.

Plea—Non assumpsit. Issue to the jury.

The plaintiff's title was the levy of an execution in favour of Nathaniel Cary, against William and John Clark, made on the 30th of January, A. D. 1764. The officers' return was, "that he made demand, and for want of money, goods, &c. he levied on the land of



the debtors, and had it apprized off according to law on said execution," and said Cary by his attorney Samuel Huntington, Esq. afterwards conveyed the said land to the plaintiff, viz. in March A.D. 1770.

The defendant offered to prove by parol testimony that said William and John had paid up said execution.

By the court—The execution and the officer's return is record evidence of the debt, and of its not having been paid at that time ; and to let in parol evidence of payment to contradict the record, after such a lapse of time, would be extremely dangerous ; and any payments made subsequent to the levy, would in this action be irrelevant, unless there had been a reconveyance of the land, for the title by the levy was vested in Cary, and by him afterwards conveyed to the plaintiff.

William Coit and Wife, &c. *vers.* — Bishop-

After a party has attempted to set aside a witness by proving his interest, by witnesses and has failed, the court will not set him aside, although in the course of his testimony, it should appear that he was interested.

ACTION of ejectment. Plea—No wrong or disseisin. Issue to the jury.

Joseph Prentice was offered as a witness by the plaintiff, and objected to by the defendant ; that he was interested in the question, for that he had within three years cut wood and timber upon said land, by liberty from the plaintiffs ; and if they failed to recover he would be liable in trespass to the defendants. To prove these facts a number of witnesses, were examined, but failed in the proof, and the witness was admitted. In the course of his testimony he was asked if he had not cut upon the land by licence from the plaintiff within three years, he answered that he had. The defendant then moved that his testimony might be set aside.

By the court—A party has three ways to evince the interest of a witness, and have him set aside—1st, By proving his interest directly by witnesses—2d, By challenging him on the *voire dire* oath ; or 3d, By

permitting him to take the witnesses oath, and interrogating him under the witnesses' oath respecting his interest. The party may elect either of the methods, but must be satisfied with the one he adopts. The objection was allowed therefore to go only to his credit, under the circumstances of the case. Vide *Mallet vs. Mallet*, adjudged at Danbury, January A. D. 1793, 1 vol. Root's Rep. 501.

Tideman Hull vs. Nathaniel Minor, Esq.

ACTION on note, dated 18th of May A. D. 1777, for £27-12-6 3-4 New-York money, payable in twelve months with interest. A statute of limitation doth not look back and take in causes of action which existed before, without special provision.

Plea in bar—The statute of New-York passed in A. D. 1788, wherein it is enacted among other things, that all actions of the case other than for slander, should be brought within six years from the time the cause of action accrued—that the note on which, &c. was executed in the state of New-York—and that more than six years had elapsed since the cause of action had accrued.

The plaintiff replied, that the defendant belonged to Connecticut, and immediately upon executing said note, he returned to Connecticut, and had resided there ever since.

A demurrer was given to the reply, and judgment, that the reply was sufficient.

By the court—This note is not within the statute, but if it was within the letter, the statute would not affect it, being an ex post facto law.

Tideman vs. Minor... An ex post facto law? It is as much an imperial prescript: —

Middlesex County, July Term, A. D. 1795.

Plumb vers. Mary Alfop.

Debts contracted during the war after the 17th Sept. 1777 for the common currency of the country to be reduced into lawful money by the scale of depreciation at the time of the contract.

ERROR to reverse a judgment of the county court in an action brought by said Alfop *vs.* Plumb, on a note dated the 9th of July, A. D. 1778, for £106 lawful money, payable in one year, with interest.

The defendant plead in bar, that said note was given for the common currency of the country, and was payable in continental bills, which, at the time said note was payable, by the scale of depreciation; were not worth more than £7-11-4 lawful money. The plaintiff traversed the plea, and the parties were at issue to the court; and the court found that said note was given for the common currency of the country, and gave judgment for the plaintiff to recover the sum of £69-7 lawful money, the value of the bills at the date of the contract, and the interest. Error assigned, that the county court ought to have assessed damages according to the value of the bills when the note was payable. Plea, nothing erroneous; and judgment, nothing erroneous, and interest allowed on the judgment.

Mary Alfop vers. Peck.

If the agreement is, that the mortgagee may dispose of the premises in case the interest is not paid annually, an action of ejectment will lie if the interest is not paid. In ejectment the jury may assess damages not only for the

ACTION of ejectment, for one acre and three quarters of land and buildings, writ dated October 28th, A. D. 1794. The defendant plead that he had done the plaintiff no wrong or disseisin, &c. Issue to the jury.

The plaintiff's title was a deed from the defendant, dated the day of June, A. D. 1791, and made defeasable upon the defendant's paying to the plaintiff a certain note for the sum of £133-15 lawful money; which note was made payable on or before the expiration of four years from the date, with the lawful interest annually; but one year's interest had been

paid upon said note, which was endorsed as follows, rents and profits but for waste committed on the premises.
 "July 27th, A. D. 1792, received £7-13-3 $\frac{1}{4}$ for one year's interest. Mary Alsop."

The defendant's title, is an agreement executed by the parties on the 28th of June, A. D. 1791; which is, that if, at the expiration of one year from the date of said note, he the said Peck, his heirs, &c. shall fail to pay to the said Mary, or her heirs, the interest as conditioned in said note, then the said Mary, or her heirs, shall be at liberty to dispose of said lands and buildings to any other person; and if at the end of four years the said Peck fails to pay the principal, she shall have right to sell the same, paying back whatever shall have been paid of the principal. Verdict and judgment for the plaintiff.

By the court—It is clear by the agreement that the principal was to lie four years, provided the interest was paid annually; if not, at the end of any one year after the date, the plaintiff had right to dispose of the premises, in which the interest was unpaid. Two year's interest remained unpaid, for which the plaintiff had right to enter. Evidence was admitted in this case, to prove not only the value of the rents, but also the waste committed, and for the jury to consider both in their estimate of the damages.

New-Haven County, July Term, A. D. 1795.

Clinton vers. Hopkins.

ACTION for a malicious prosecution, declaring that the plaintiff had sustained a fair reputation and character, until on or about the 1st day of March, A. D. 1792, when he was at Montreal in the Province of Lower Canada, prosecuting his lawful business, the defendant being also there; and not
 A demand for a breach of contract and for a tort or breach of covenant cannot be joined in the same action.

ignorant of the premises, but minding, contriving and maliciously intending to deprive him of his good name and reputation, and bring him into scandal and disgrace; to subject him to the loss of liberty, the loss of property and the risk of his life;—did then and there at said Montreal, on said 1st of March A. D. 1792, contrive and invent a false, feigned and groundless pretence, that he had lost a sum of gold, about £48, and did assert that the same was feloniously taken and stolen from him by the plaintiff at said Montreal, and did falsely and maliciously charge the plaintiff with having stolen said gold, and threatened to prosecute him for the same, and to make him a public example; unless he the plaintiff would settle it. The defendant belonging to Hartford in Connecticut, and the plaintiff although conscious of his innocence, and being a stranger in a foreign country, without friends and knowing that the punishment of said crime according to the laws there in force, was death; proposed to the defendant to suspend any further proceedings, until he should be able to obtain more certain information respecting said gold; and that the plaintiff would give a bond with surety to answer to said charge after they should return into Connecticut; to which the defendant agreed; and the plaintiff gave him a bond with good sureties, conditioned to be answerable for all the money the defendant should make it appear he had lost, and the plaintiff had stolen or taken; which bond the defendant then and there accepted; and did engage to leave said matter for a more particular investigation until they should arrive within the United States; yet the defendant after taking the aforesaid bond and after the agreement aforesaid, still pursuing his aforesaid malicious and wicked intention, did afterwards, on the 2d of March A. D. 1792, present himself before Thomas M'Cord, Esq. a Justice of the Peace within and for said district, and province aforesaid, and did then and there in the presence of Almighty God, and being sworn on the Holy Evangelists, depose, that a considerable sum of money had been taken from him, (meaning, that said money had been felo-

niously taken and stolen from him, and meaning the aforesaid sum of gold) and that, he had probable cause to suspect, and did suspect that said money had been taken by the plaintiff; and the defendant did thereupon pray process against him the plaintiff; and the defendant on his aforesaid complaint did then and there, procure a warrant against him the plaintiff, and the defendant did then and there falsely and maliciously enforce upon the plaintiff the aforesaid crime of felony; and did maliciously cause him to be arrested as a felon, by force of said warrant, and to be carried before the above named Thomas M'Cord, Esq. to abide the sentence of the law respecting the aforesaid charge of felony; and said justice did on said 2d of March, on a full hearing of said matter, adjudge that there was not sufficient evidence to commit the plaintiff, or to hold him to make further answer to said charge of felony, or complaint, and did release him therefrom, as by the records of said justice ready to be produced in court would appear.

And the defendant more effectually to complete his aforesaid wicked intentions, did at sundry times on or about said 2d of March, there insinuate, suggest and assert in the hearing of sundry people, inhabitants of said Montreal, and others living in distant and remote parts, that the plaintiff had taken said money and that the plaintiff had stolen said money from him the defendant—and did by wicked and malicious assertions, which the defendant knew were false and groundless, induce them to give credit thereto—whereby the plaintiff's good name, &c. was exposed, and his life and personal safety endangered; that at the time of making the assertions aforesaid and exhibiting said complaint, the defendant had not lost any money as he pretended; but said accusation was contrived, made and entered wantonly, rashly and maliciously, without any the least color, cause or pretence.

To this action the defendant pleaded a long special plea in bar; which was replied to and traversed by the plaintiff. The defendant affirmed over the several matters traversed by the plaintiff; and the parties

NEW-HAVEN COUNTY,

were at issue to the jury. The jury by their verdict found the facts put in issue by the traverse in favor of the plaintiff; upon which the defendant moved in arrest of judgment on account of the insufficiency of the declaration. The court determined the motion in arrest to be sufficient.

By the court—The plaintiff has laid in his declaration two distinct independent causes of action; one for a breach of contract, and the other for a tort or breach of law. It is a principle of law, the reason of which is obvious, and which has been too long established to need any illustration, that a cause of action arising from a tort, and a cause of action arising from a breach of contract cannot be joined in the same action; that is, the plaintiff may not join in one action a demand upon the defendant for breaking his promise, and also a demand for his breaking the plaintiff's bones.

The declaration states, that the defendant in consideration of the plaintiff's having given a bond with surety to pay him whatever sum of money he the defendant should make it appear he had lost, &c. after they returned into Connecticut, the defendant engaged to suspend said matter for a more particular investigation, until they should arrive within the United States; yet the defendant after taking said bond, and after the agreement aforesaid, still pursuing his malicious intentions, did prosecute the plaintiff there, and did not leave the matter till they arrived within the United States—Here is a complete cause of action stated, founded on a breach of contract, and to which no answer at all has been given.

The plaintiff has also stated in his declaration, that on the 1st of May A. D. 1792, he being in Montreal, in the province of Lower Canada, pursuing his lawful business, the defendant being also there, and not ignorant of the premises, but minding, contriving and maliciously intending to deprive the plaintiff of his good name and reputation, and bring him into scandal and disgrace, and to subject him to the loss of

liberty, the loss of property, and to the risk of his life, did then and there contrive and invent a false, feigned and groundless pretence, that he had lost a sum of gold about £48, and did assert that the same was feloniously taken and stolen from him by the plaintiff; and did at said Montreal, falsely and maliciously charge the plaintiff with having stolen said gold—and the defendant still pursuing his aforesaid malicious and wicked intentions, did afterwards on the 2d day of March, A. D. 1792, present himself before Thomas M^cCord, a justice of the peace in and for said district and province aforesaid, and being sworn, did depose, &c. as laid in the declaration; from which charge he alledges that he was legally acquitted, and that the defendant had not lost any money; but that said accusation was contrived, made and entered, wantonly, rashly and maliciously, without any the least color, cause, or pretence. Here is a distinct and perfect cause of action laid, founded in a tort, wholly independent of the other. Now if the agreement and the breach of it had been laid, only as an aggravating circumstance to enhance the damages, and the only gist of the action had been the malicious prosecution; or if the agreement and the breach had been laid as the gist of the action, and the malicious and false prosecution had been set forth, to shew the aggravations of the breach, they might have been reconciled and the declaration saved—but this could not be done, in this case, consistently with any rules of construction.

Some of the court had doubts with respect to other parts of the declaration; as this action is for a malicious prosecution, set on foot in a foreign jurisdiction, the declaration ought to have set forth what the law of that jurisdiction was, respecting the nature of the crime and its punishment, for which the plaintiff was prosecuted; and also the power and jurisdiction of the justice; these all being in a foreign country, cannot be known by the court, only as they are alleged and proved, like any other matters of fact.

NEW-HAVEN COUNTY,

This judgment was afterwards carried by writ of error to the supreme court of errors, and there affirmed June A. D. 1796.

Mary and Thomas Wooster, administrators of David Wooster, Esq. deceased, *vers.* Silvanus Bishop.

An action of debt lies in favor of administrators on a judgment recovered by the intestate in his life time.

ACTION of debt on judgment, declaring that before the adjourned county court holden at New-Haven on the second Tuesday of January A. D. 1775, said David Wooster, being in life, recovered a judgment against said Silvanus Bishop, for the sum of £20 debt and £3-2-9 cost, which the defendant had never paid.

The defendant having prayed oyer of the judgment declared upon, which being read to him, was in the words following, viz. "At an adjourned county court holden at New-Haven on the second Tuesday of January A. D. 1775, David Wooster recovered a judgment against Silvanus Bishop, in a plea of the case on note, dated the 28th of October A. D. 1768, for £20 debt and £3-2-9 cost. Execution granted March 20th, A. D. 1775"—and thereupon the defendant pleaded that the plaintiffs' declaration, &c. were insufficient in the law. The plaintiffs joined the demurrer.

Upon arguing the cause, and some observations which fell from the court, the defendant moved for liberty to alter his plea, which was granted; he then added, upon which judgment, execution issued in the life time of said David, and prayed judgment.

And the plaintiffs replied, that said execution had never been levied nor any way paid or satisfied. To which the defendant demurred.

Judgment—That the reply of the plaintiffs was sufficient and for them to recover.



Fowler *vers.* Collins.

ACTION of the case for words, charging the plaintiff with the crime of stealing and of committing a forgery.

Plea—Not guilty. Issue to the jury.

The defendant in this case, in order to prove that the plaintiff had been guilty of a forgery, offered in evidence the record and judgment of the superior court in a cause between Chittington and Seth Turner; in which trial a power of attorney set up by said Turner to be a power from said Chittington to said Fowler, to receive money of Turner, was found to be a forgery. This was objected against, and by the court, it cannot be given in evidence in this case against Fowler, he not being a party to that judgment.

A record may not be given in evidence against another who was not a party to it.

A person may be a witness to prove the truth of certain words notwithstanding a suit is depending against him for speaking the same words.

The defendant also moved that said Chittington and wife might testify relative to said power of attorney's being altered by said Fowler, and were admitted, notwithstanding said Fowler had then an action of defamation depending against said Chittington for saying that he had forged said power of attorney.

By the court—Chittington is not interested in the event of this suit, nor can what he testifies be used in his favor in any other suit, and in order to make out an interest in the question, it is not enough that Fowler has sued him for speaking the words, but that he in fact has spoken them; besides, the defendant is interested in the testimony of Chittington and wife, and the plaintiff may not deprive him of it, by bringing a suit against the husband.

Fowler *vers.* A. Norton.

ACTION of ejectment for 1-5 of a tract of land lying in common with the defendant's land.

Plea—no wrong, &c.—Issue to the jury.

A person who has sold his land for a valuable consideration, and af-

terwards it is taken by a creditor on an execution, cannot be a witness to prove, either that the debt in the execution, or that the deed is fraudulent.

The plaintiff's title was an execution against Henry Norton, one of the sons and heirs of Charles Norton, deceased; dated 21st June, A. D. 1794, and levied on the 7th July, A. D. 1794, upon the said Henry's undivided share of his father's estate. The defendant's title was a deed from Henry and G. Norton, for the consideration of £70, of all their right in their father's estate, dated 23d of April, 1787, and recorded the 9th of October, 1793. The plaintiff attempted to prove this deed to be fraudulent; upon which the defendant attacked the plaintiff's debt as being fraudulent, and in order to prove it he offered said Henry Norton as witness; but by the court he cannot be admitted; he has sold the land to the defendant, and the plaintiff has taken it by execution to pay a judgment debt he had against him; he cannot be a witness against the deed he gave to the defendant, nor against the debt for which the plaintiff recovered judgment against him.

Daniel Ford, son and heir of John Ford, deceased.

The judge of probate may be a witness to a will.

APPEAL from a judgment of the court of probate, approbating the last will and testament of said John Ford; for the following reasons, viz. Edward Ruffel, Esq. the judge of probate, who proved and approved said will, was appointed the executor of said will; was one of the witnesses to said will; and was also a debtor to said John Ford, the testator. That he could not be executor, to procure said will to be proved and to execute it; witness, to prove it; and judge, to approve it at the same time.

The appellee replied, that before the probate of said will, said Edward Ruffel resigned the office of executor to said will. To this a demurrer was given.

By the court—The reply is sufficient. The office of executor, the judge has divested himself of by resigning it; and the judge of probate may be a witness to a will. See *McClean vs. Barnard*, 1 vol. Root's Rep. 462, and *Straton vs. Straton*, ante.

Fairfield County, August Term, A. D. 1795.

William Laight *vers.* Isaac Tomlinson.

SCIRE FACIAS, declaring that he was administrator on the estate of Abraham Biggs, who was surviving partner of Thomas Pennington of Bristol, in Great Britain, deceased ;—that on the 28th of December A. D. 1787, he took out a writ of attachment against Charles M'Evers of New-York, as administrator aforesaid, for a debt said Charles long before, and then owed to said company of Biggs and Pennington ; said Charles being an absent absconding debtor,—and therein directed that copies should be left with Isaac Tomlinson of Woodbury, as agent, attorney and debtor to said Charles M'Evers and said Charles and company ; and copies were left accordingly with said Isaac on the 9th of February 1788 ; and said writ was returned to the county court, holden at Fairfield on the 3d Tuesday of April A. D. 1788 ; and before the adjourned county court holden at said Fairfield on the 4th Tuesday of January A. D. 1789, he recovered judgment for £7000 debt and £12-7-6 cost : And on the 4th day of July A. D. 1789, he prayed out execution on said judgment of that date, returnable to the then next November county court ; which execution was delivered to an officer, who returned the same, endorsed October 8th, 1789, that he had made diligent search throughout his precincts and could find neither the person nor the estate of the debtor whereon to levy, and also that he made demand of said Isaac of monies to satisfy said execution, but none was paid—Alledging that said judgment and execution remained in force unsatisfied, and that said Isaac was and at the time of leaving said copy in service and still is agent and debtor to said Charles M'Evers and to said Charles and company, to the amount of said execution. Writ dated 29th March, A. D. 1791.

In a *felre facias* against a garnishee it must be averred, that the defendant in the original action, was an absconding debtor at the time the writ was served, and that he was so described. A creditor must take out execution and make demand of the garnishee within sixty days of the judgment or be barred of his remedy.

Isaac Tomlinson plead and shewed cause why no

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recovery should be had against him. He admitted that on the 9th of February A. D. 1788, when said copy was left with him in service, he was indebted by notes to said Charles £930-11-2 York money, and to said Charles and company the sum of £927-0-7, and no more; also that the writ, process and service, and the judgment and execution was as stated in the scire facias, and alledged that no demand was made upon him by said execution until the 8th of October A. D. 1789. And that on the 5th of November 1790, Charles W. Apthorp brought forward his action on bond against said Charles M'Evers as an absconding debtor, demanding £20,000, and served the defendant with a copy, as attorney and debtor to said Charles on said 5th of November A. D. 1790; which writ was duly returned to New-Haven county court, holden on the 4th Tuesday of November 1790—and on the 3d Tuesday of March A. D. 1791, the said Apthorp recovered judgment against said M'Evers for £20,000 debt, and £1-11-9 cost, and took out execution and delivered it to a proper officer, who had made demand of the said Isaac—but he refused to pay it on account of the pendency of said Laight's suit; and said execution remained unsatisfied. And said Isaac further plead, that on the 14th of November A. D. 1786, the said Charles M'Evers, to defraud his creditors and to avoid the debt of said Apthorp, did make over and assign all his effects, &c. to Gulian Verplank and to Daniel C. Verplank, by a fraudulent conveyance; by which he conveyed all his lands and the greatest part of his property in the state of New-York, and all his effects and debts in this state, including the debt due from said Isaac, to them in trust to hold and apply so much thereof as should be necessary and proper for the support and maintenance of said Charles and family—and on this further trust, that they should pay and satisfy such debts and demands on said Charles or Charles and company, or such parts of said debts, and upon such terms and conditions, as to them should seem legal, just and right; and after paying all said debts, that they should convey all the residuum to said Charles M'Evers—

which conveyance was received and accepted by said Gulian and Daniel, for the purpose of covering the effects of said Charles and defrauding his creditors— And that the said Gulian and Daniel and said Laight with the same fraudulent intent and design, procured and instituted said original suit in favor of said Laight against said Charles M'Evers; in which said judgment was rendered, and for the affirmance of which, this scire facias was brought; and the whole of said proceedings in said cause were procured and devised by fraud and collusion between said trustees and said Laight, to carry into effect the fraudulent purpose of said assignment, and to avoid the debt of said Apthorp.

The plaintiff replied and affirmed, that the judgment recovered by him against said M'Evers, was for a bona fide debt due from him to said Pennington and Biggs, and recovered without any fraud or collusion— without that, that said Laight, Gulian and Daniel C. Verplank, with a fraudulent intent, devised and instituted said original process in favour of said Laight, against said M'Evers above recited, and without that that the proceedings thereon, were by fraud and collusion between said Verplanks and said Laight, to carry into effect the fraudulent design of said assignment, and to defeat the debt of said Apthorp, all in manner and form as the defendant in his plea in bar had alledged.

The defendant affirmed over his plea in bar, and the parties were at issue thereon to the court.

The court found that said original suit in favour of said Laight, against said M'Evers, was not devised and instituted by said Laight, Gulian and Daniel, with a fraudulent intent; and that the proceedings thereon were not by fraud and collusion between said Verplanks and said Laight, to carry into effect the fraudulent design of said assignment, and to defeat the debt of said Apthorp, as the defendant in his plea and rejoinder had alledged. In the course of the trial it appeared that the debt due from the defendant to said Charles M'Evers and company, was the property of

FAIRFIELD COUNTY,

said Charles, by force of an assignment made to him previous to the service of the original suit.

In this case two questions of law were made, viz. 1st, Whether the garnishee might take advantage of the fraudulency of the original suit and judgment, as it respected creditors, to avoid paying his debt.—2d, Whether, to entitle the plaintiff to recover, he ought not to have taken out execution and made demand of the garnishee within sixty days of the judgment.

As to the first question, whether the garnishee could take advantage of the fraudulency of the original action against the absconding debtor, to avoid the creditors' suit against him : The court having found that the original suit in this case was not fraudulent, that question was laid out of the case.

As to the second question, whether the execution ought not to have been taken out and demand made of the defendant, said Tomlinson, within sixty days of the judgment : The court were of opinion, that it was highly reasonable that it should be so ; but they considered the statute which regulates proceedings of this kind, which is, " And if judgment shall be rendered " for the plaintiff in the original suit, all the goods " or effects which are in the hands of the attorney, " &c. to the value of said judgment, shall be liable " and subjected to the execution granted on such judgment towards satisfying the same, and from the " time of serving the writ or summons, aforesaid, that " is, the original writ, shall be liable and be secured " in law in the hands of, and may not otherwise be " disposed of, by such attorney, agent, &c. And in " case such attorney, &c. shall transfer, remit or convert to his own use any of the effects of such absconding debtor, after the time of his being served " with said original writ, against said debtor, which " were in his hands at the time of said service, with- " in what shall satisfy the judgment against the principal, or that shall not expose and subject such goods " and effects of such debtor in his hands to be taken " on execution against said debtor, for and towards

“satisfying said judgment; so far as they will extend, shall be liable to satisfy the same, of his own proper goods or estate as much as if it was his own proper debt; and a writ of scire facias may be taken out from the clerk of the court, where the judgment was given, against such attorney, &c. and upon his default of appearance, or refusal to disclose upon oath, what goods and effects of such absconding debtor are or were in his hands or possession, judgment shall be entered up against him as for his own proper goods and estate.”

Here is no time limited in which execution shall be taken out and demand made by the creditor of the attorney, &c. of the effects of the absconding debtor's in his hands; nor in which a scire facias shall be taken out against said attorney, &c. Where a debtor's person is attached and committed to prison for want of bail, the law is express that the execution must be taken out and levied upon the debtor within five days after the rising of the court, &c. or the debtor will not be holden. So in case of bail, the execution must be taken out, and a non est returned within sixty days or the bail will not be holden, and a scire facias must be taken out in twelve months from the judgment against the bail; so where personal property is attached, the execution must be taken out and levied within sixty days, and in case of real property it must be taken out and levied within four months of the judgment, or the property in either of the above cases will not be holden—so the law requires, that upon all writs of attachment, bond shall be given; but on summons against absconding debtors, which is, as effectually to secure property in the hands of the attorney, agent, factor, trustee or debtor, no bond is required—and although it appeared to the court to be highly reasonable that there should be a law of limitation in cases like to the one under consideration, yet they could not say that there was any, which the defendant could plead in bar of the plaintiff's right of recovering, or which would justify the court in saying that the plaintiff should not recover. Judgment was

therefore for the plaintiff to recover the effects of Charles M'Evers in the hands of said garnishee which was the debt he owed to said company, also the debt he owed said Charles in his private capacity. For it appeared from the evidence that the debt due to said company was said Charles M'Evers, by assignment.

This judgment was afterwards reversed by the supreme court of errors, in June, A. D. 1796, upon the three following grounds.

First, it doth not appear by any averment in the scire facias that said Charles M'Evers was an absent absconding debtor, or that he was so described to be in the original process against him, when said copies were left in service with said Tomlinson, on the 9th February, A. D. 1788 ; which it was necessary should have been averred in the scire facias, in order to render the garnishee liable ; for this defect in the declaration, judgment ought to have been for the defendant.

Secondly, Because judgment was rendered against said Charles M'Evers at the adjourned county court. holden on the 4th Tuesday of January, A. D. 1789, and no execution was taken out until on the 4th of July, A. D. 1789 ; and no demand made of the defendant, said Tomlinson, until the 8th of October A. D. 1789, which was more than sixty days, from the judgment, the time limited by statute for personal property attached to be holden after the judgment, and is an unreasonable delay ; and although the statute does not provide any express limitation in this case, yet it is clearly within the reason of the limitation in other cases similar to this.

Thirdly, The judgment is apparently unjust, for it is for the whole sum due from the defendant to Charles M'Evers, and Charles M'Evers and company, when it ought to have been only for what the garnishee owed Charles M'Evers in his private character and his proportion of the debt due to the company.

John St. Andrews *vers.* Michael Lockwood:

ACTION on covenant, declaring that the defendant, as administrator of Jabez Lockwood, did by deed dated 21st of October A. D. 1785, for the consideration of £81, sell and convey to the plaintiff two pieces of land described in said deed, and covenanted and engaged for himself, &c. that said Jabez was well seised, and that he had good right to sell, &c. also engaged for himself, &c. to warrant and defend said lands to the plaintiff, his heirs and assigns, against all claims and demands—That the defendant had not kept his covenants; for that said Jabez was not seised of said lands in his life time, and the defendant had no right to sell them, and that Gideon Lockwood had since evinced by judgment of the county court, that he had a good right to about five and an half acres of said granted premises.

No person may take advantage of his own fraud to defeat another's title, in advancement of his own.

A prior deed which has been prevented being recorded by fraud, shall when recorded, prevail against a later deed although recorded before it.

Plea—That the defendant had kept and performed his covenants in said deed, and had good right to sell said lands.

The plaintiff replied, that on the 15th of June 1772, said Jabez Lockwood was well seised of said lands, and on the same day bargained and conveyed the same by deed of that date to Simeon Couch, in mortgage, to secure the sum of £16-10, and the interest, to be paid on the 15th of June 1774—that said sum being unpaid on the 9th of December A. D. 1789, said Couch for the consideration of £21 lawful money, did release said mortgaged premises to Thaddeus Bennet, which deed was duly acknowledged and recorded; and said Bennet by deed of the same date released and quit claimed all his right in said mortgaged premises unto Gideon Lockwood; and said Gideon thereupon entered upon said premises and ever since had held the same; and that the plaintiff sued said Gideon in an action of ejectment for said land, before the county court holden at and the said county court gave judgment on the plea of not guilty, that said Gideon was not guilty—that said

FAIRFIELD COUNTY,

Jabez was not in his life time and at his death well seised of said land, nor had the defendant good right to sell the same, and the defendant had not kept his covenants.

The defendant rejoined, that his deed to the plaintiff mentioned in the declaration, was duly recorded on the 10th day of January 1787, and the deed to said Couch from said Jabez, dated the 15th of June 1772, was recorded on the 4th of January 1790, and not before.

The plaintiff surrejoined, he admitted the deed from the defendant to the plaintiff to have been recorded on the 10th of January 1787, and the deed from said Jabez to said Couch not to have been put on record until the 4th of January 1790—Yet that on or about the 8th of March 1780, said Bennet paid to said Couch £22 lawful money, which Couch received in full of said mortgage and of said Couch's right therein, and gave his receipt therefor accordingly to said Bennet; and thereupon he sold and delivered to said Bennet said mortgage deed; and that the defendant afterwards, on or about the 10th of June 1783, by art and fraud, got said mortgage deed into his hands, and wickedly and fraudulently withheld said deed from said Couch and Bennet, to prevent its being recorded, until the 15th of June 1789; and in the mean time, viz. on the 21st of October 1785, the defendant then holding said mortgage deed, which he artfully concealed from the plaintiff, sold and conveyed said lands to the plaintiff by deed, set forth in the declaration; and after having said deed recorded, he delivered up said mortgage to said Bennet, which was recorded as aforesaid, all in manner and form.

The defendant rebutted—he admitted that Bennet paid £22 to Couch, which was due on said mortgage, yet that he paid it with the money of said Jabez as his agent and for his use, and said Bennet took up said mortgage—and after said Jabez's death, he delivered the same to the defendant as his administrator; and that said deed lay in the hands of the defendant the

time it remained there, by the consent of said Bennet—without that, that on the 10th of June 1783, the defendant artfully and fraudulently got said mortgage deed into his hands, and fraudulently withheld the same from said Couch and Bennet, to prevent their getting it recorded, until the 15th of June, 1789—and without that, that the defendant artfully and fraudulently concealed said mortgage deed from the plaintiff on the 21st of October 1785, in manner and form as the plaintiff in his surrejoinder had alledged:

The plaintiff surrebutted, that on the 8th of March 1780, said Couch sold said premises to said Bennet—and that in June 1783, the defendant artfully and fraudulently got said mortgage deed into his possession, and wickedly withheld it from said Bennet and Couch until the 15th of June 1789, to prevent their getting it recorded; and that on said 21st of October 1785, the defendant artfully and fraudulently concealed the existence of said mortgage from the plaintiff; all in manner and form, &c.

Issue to the jury. The jury found the facts as alledged in the plaintiff's surrebutter and for the plaintiff to recover.

The defendant made a motion to the court that judgment should be for the defendant, the finding of the jury notwithstanding. This motion was adjudged to be insufficient.

By the court—If the lands described in the defendant's deed were well vested in the plaintiff by force of said deed, then there certainly is no breach of covenant. The defendant's deed to the plaintiff, it is agreed in the pleadings, was given on the 21st of October 1785, and recorded on the 10th of January 1787. Jabez Lockwood's deed to Couch was not recorded until the 4th of January A. D. 1790—By this, the title at law would be completely vested in the plaintiff, unless something is found by the verdict or admitted in the pleadings, which prevents the legal operation of these transactions. The plaintiff is a



bona fide purchaser, for a valuable consideration, without notice of said mortgage deed. And as the jury have found that the defendant artfully got said deed and fraudulently suppressed it, and by that means prevented its being sooner recorded, he can take no advantage of this, for that would be allowing him to take advantage of his own wrong.—The recording of the deed to Couch having been prevented by the fraud of the defendant, shall when recorded, relate back so as to defeat the fraud, and validate Couch's title.

Benjamin Green, administrator of Nathaniel Green, *vers.* Abbot and Smith, administrators of Lemuel Morehouse.

The balances found due from an estate represented insolvent, are to be paid with interest, if there is a sufficiency of assets.

WRIT of error to reverse a judgment of the county court, in an action brought by said Green *vs.* Abbot, &c. on a note executed by said Morehouse, on the 6th of October 1773, for £183 lawful money, payable on demand, with interest.

The defendants plead, that on the 8th of January 1781, they duly represented said Morehouse's estate insolvent, to the court of probate—that commissioners were appointed and sworn, and that the plaintiff exhibited said note to said commissioners before the month of February 1782, who found then due on said note the sum of £179-4-9 1-2 and no more, and included the same in their report of debts found due from said Morehouse's estate to the several creditors, dated 21st February 1782, which report the court of probate accepted and approved; and that since said 21st of February 1782, and before the impetration of the plaintiff's writ, they had paid to the plaintiff the sum of £194-4-9.1-2 lawful money, in full satisfaction of the sum so found due on said note, which the plaintiff had received.

The plaintiff replied, that the sum of £194-4-9 1-2 paid on said note mentioned in the defendants' plea was made up of the sums and dates as follows, viz. £60 on the 17th of January 1787—£37-4-4 1-2 on

14th August 1787—£15 on the 24th of November 1788—£3 in January 1789—and £13-0-3 on the 18th of August 1790—£42 on the 2d of February 1791—and £12 on the 20th of August 1791, which were all the payments that had been made on said note since the 21st of February 1782, to make up the said sum of £194-4-7 1-2, and which was not in full of the sum due on said note, nor of the sum found by the commissioners.

To this reply a demurrer was given by the defendants, and judgment of the county court that the reply of the plaintiff was insufficient, and for the defendants to recover their costs.

Error assigned—That the county court ought to have adjudged the reply of the plaintiff sufficient. Plea—Nothing erroneous.

Judgment—Manifest error. By the court—The payments do not amount to the sum found and reported by the commissioners, to be due on said note, and the interest since arisen on it—and as no deficiency of assets is shewn by the defendants, there is no reason why they should not pay the interest as well as the principal of said note, and judgment was given accordingly.

John Blackman, jun. *vers.* Peter Nichols.

ACTION on note, dated 1st of December 1792, for £500—damage £200, writ dated 5th of February 1793.

Plea in bar—That on the 4th September 1792, Polly Blackman, daughter of the plaintiff, had commenced her action against Nathaniel Nichols, son of the defendant, in the state of Vermont, demanding £400 damages for breach of promise, for leaving her in a pregnant state, and marrying another woman, in direct violation of his promise to marry her, as alleged in her declaration; which action it was mutually agreed should be called out of court without cost, and be submitted to arbitration—and that thereupon the plaintiff

Where the defendant pleads in bar a submission of sundry matters, and that the arbitrators made no award as to one of them, and the plaintiff traverses, the matters be-

ing submitted concerning which they made no award, and the jury find that said matters were not submitted and for the plaintiff to recover, this is not an immaterial issue.

and his daughter Polly, of the one part, and Peter Nichols the defendant, for himself and son Nathaniel of the other part, did on the 11th of December 1792, mutually agree and submit said action to the arbitrament and final award of Messrs. John Beach, Gideon Botsford and Nehemiah Strong, Esq's. to be by them heard and determined according to law, in the same manner as a court of law might; and the legal cost to follow suit—and each party to have the same privilege in the trial in all respects as at law. Said arbitrators to meet at the house of said Strong, and to adjourn as they should find it expedient, provided they made and published their award to the parties by the first day of January A. D. 1793; and said John and Peter executed to each other their several notes of the tenor and date of the note in suit, and delivered the same to said arbitrators, to oblige them to abide the award said arbitrators should make in the premises, said arbitrators to endorse said notes down to the sum they should award.

And it was further proposed and agreed by the defendant to submit all matters of controversy subsisting between said parties, provided said John and Polly would explicitly state their claims upon the defendant or said Nathaniel, that each might be considered and determined separately, and the cost awarded on each claim; and that said John and said Polly named their claim, viz. 1st, said action at Vermont contained in the declaration—2d, an action by said Polly for seduction and begetting her with child—3d, her suit for maintenance of said child—which three several matters afore-said were distinctly and severally submitted to said arbitrators to consider and award upon severally according to law—and in case they should award said Nathaniel to maintain said child, the sum found should be put into several small notes, and presented to said Nichols to sign, and in case he refused, the sum so awarded for him to pay for said maintenance, should be left due on said large note with such other sums as they should find for said Nichols to pay; and to deliver said Peter's note so endorsed to said John, and what sum

they should find for said John or Polly to pay should be left due on said John's note, and to be delivered to said Nichols—and that said arbitrators never made and published any award in the premises, pursuant to their instructions aforesaid.

The plaintiff replied, that said parties did submit said first and third matters of dispute as the defendant had alledged, and did also give power to any one or two of said arbitrators to adjourn ; and also gave them to the 10th of January 1793, to make and publish their award—and that said arbitrators met at said Strong's pursuant to said instructions, and heard the parties ; and on said 10th of January published their award to said parties, as follows, viz. that said Nathaniel should pay to said Polly in satisfaction of said action, £57-6-7—and also that he pay for the maintenance of said child to said Polly, the sum of £30-7-9, which was put into small notes and presented to said Nichols to sign, which he refused—and said arbitrators did endorse said note down to the sums so found and awarded as aforesaid, with cost, amounting to £97-13-4—which award they published on said 10th of January to the parties ; and that said Peter and Nathaniel, they nor either of them, had ever performed said award, and said note was endorsed by said arbitrators to the sum of their award, and delivered to the said John, and the plaintiff ought not to be barred without that, that said second article mentioned in the defendant's plea was submitted to be awarded upon, as a separate distinct claim.

The defendant rejoined, that said John Beach went to New-York, and did not return until late in the evening of said 10th of January, and said Strong and Botsford met on the 8th, 9th and 10th of said January and proceeded in the absence of said Beach, to hear and consider of the matters submitted ; and said Strong held and perused certain depositions, written minutes, and arguments of the plaintiff's council, unknown to the defendant, and which were never publicly read before said arbitrators, from the last of December to said 10th day of January. That the defendant was at

FAIRFIELD COUNTY,

said Strong's all said 8th, 9th and 10th days of January, until dark, waiting for said Beach to return, but he not returning, the defendant desired said Strong and Botsford to proceed no farther on the matters submitted, as it had then become impracticable he should have a full hearing on the matters submitted, agreeable to said instructions—and that he never had any hearing on said matters submitted mentioned in the plaintiff's reply before said arbitrators, on said 8th, 9th and 10th days of January ; but was precluded therefrom by the absence of said Beach ; nor had he ever any hearing relative to any bill or bills of cost. Nor did said arbitrators ever present to him any notes to sign for the maintenance of said child, according to their award in that particular—and said arbitrators proceeded partially to deliver said note to the plaintiff without ever having made and published any award agreeable to their instructions, which the defendant said he was ready to verify, &c. And the defendant further said, that the second claim mentioned in his plea in bar, was submitted in manner and form as therein stated, and put himself on the country.

The plaintiff joined issue on the traverse to the jury, and demurred specially for duplicity to the first part of the defendant's rejoinder, which concluded with a verification.

The jury found that said second claim mentioned in the defendant's plea was not submitted, and found for the plaintiff to recover £97-13-4 damages and his cost.

The defendant made a motion in arrest that the issue joined to the jury was immaterial. The court gave judgment that, that part of the defendant's rejoinder demurred to, was insufficient, and that the motion in arrest was insufficient ; and that the plaintiff recover, for by the whole of the pleadings the plaintiff is intitled to judgment. In this case other witnesses besides the arbitrators were admitted to prove, what the submission was.

Zalmon Booth *vers.* Uriah Wallace.

ERROR to reverse a judgment of the county court in an action brought by Booth against Wallace, declaring that the defendant in and by a certain note, promised to pay him £32-12-5 lawful money with the interest, by the 23d of January 1792, which note was in the words following, viz. "For value received I promise to pay to Zalmon Booth, thirty-two, twelve shillings and five pence lawful money, by the 23d of January 1792, with lawful interest;" and alledged that the defendant had never performed his promise.

What is necessarily implied in an obligation, need not be averred. In a note given for "thirty-two, twelve shillings and five pence lawful money," the word pounds is necessarily implied.

The defendant plead in bar, that said note was given for 12/5 and no more; and that the defendant on the 10th of March 1790, tendered to the plaintiff 12/5 and the interest, which he refused to accept.

The plaintiff replied, that said note was given for £32-12-5 and that he ought not to be barred without that, that said note was given for 12/5 and no more.

Upon which an issue was joined to the jury—And the jury found that said note was not given for 12/5 and no more, and for the plaintiff to recover £36-15 lawful money.

A motion in arrest was made that the issue was immaterial, and that judgment ought to be for the defendant. Which motion in arrest was judged to be sufficient by the county court—And that the declaration of the plaintiff was insufficient in the law.

Errors assigned—1st, That the issue was material—2d, That the declaration was sufficient.

Plea—nothing erroneous. Judgment—manifest error.

By the court—This note is expressed to be for thirty-two, twelve shillings and five pence. The word pounds, after the words thirty-two, is necessarily implied, and the omission it is clear, was owing to the mistake of the scribe who drew the note—and the

LITCHFIELD COUNTY,

implication is so clear and strong, that it is not necessary it should be averred in the declaration more fully than it is.

Bush *verf.* *Byvanks:*

An averment
contrary to the
record, is not
admissible.

WRIT of error to reverse a judgment of the county court in an action brought by said *Byvanks* *vs.* *Bush*, which action came to the county court holden at Danbury, on the last Tuesday of February, A. D. 1793, which was the 28th day, and set forth a record of the judgment, bearing date the 28th day of February A. D. 1793, for the said *Byvanks* to recover of said *Bush* the sum of £7-13-4 lawful money; averring that said judgment was actually entered up on the 8th day of said court, and that the plaintiff in said suit died during the setting of said court, and before said judgment was entered up, and no executor having entered to prosecute said action.

Error assigned was, that the county court rendered judgment in favour of the plaintiff in said action after he was dead.

Plea—Nothing erroneous. And judgment—That there was nothing erroneous in the judgment complained of.

By the court—The record of the judgment bears date the 28th of February, when the plaintiff was alive. The averment in the writ of error, that judgment was not entered up at the time, is an averment against the record, and is not admissible.

Litchfield County, August Term, A. D. 1795:

Joshua Church *verf.* *Parmele* and others.

Warrant to
collect a penal-
ty, incurred for

ACTION of trespass, assault and battery, committed on the 4th of March, 1792.

The defendants plead severally not guilty. Issue to the jury. a military delinquency, issued after the law is repealed, which enacted it, is illegal and void.

The case was—the plaintiff was captain of the military company in Bethlem, and granted and signed two warrants against Samuel Parmele, one dated the 15th of December 1792; the other dated the 24th of January A. D. 1793—the first was directed to N. Lambert, orderly sergeant of the third company in the 13th regiment of militia, and was as follows, viz. “Whereas Samuel Parmele, belonging to said company, and liable by law to do duty therein, did neglect and refuse to appear and train, and shew his arms, &c. on the 1st Monday of May, A. D. 1792, having been duly warned for that purpose, and did not within twelve days next after said first Monday, make any satisfactory excuse to the commanding officer of said company, why he did not attend and do his duty—by means whereof he has incurred the penalty of 6s. for non appearance, and 3s. for not shewing his arms; these are therefore to command you,” &c.

The other warrant was of the same tenor, for a delinquency on the first Monday of October A. D. 1792.

At a general assembly holden on the second Thursday of October, A. D. 1792, the whole code of militia laws was repealed, and a new one enacted in its room, without making any provision respecting past delinquencies.

The plaintiff went to assist in the levying of these warrants, and now offered them as a justification for what he did in assisting his orderly sergeant to take said Samuel Parmele, which drew upon him the assault and battery complained of. These warrants were objected to, as being illegal and void; there being no law in force to justify the granting of them at the time they issued.

By the court—They are not admissible, because illegally issued—all penalties for military delinquencies

LITCHFIELD COUNTY,

incurred before, and for which warrants had not been issued previous to the repeal of the law, are not collectable.

A bill of exceptions was allowed, and the judgment affirmed in the supreme court of errors.

Barber vers. Andrews.

The garnishee allowed out of the monies in his hands for the cost he was at in defending his principal in the original action.

SCIRE FACIAS against said Andrews, as attorney and factor to Joel Ackly, jun. an absconding debtor. He appeared for his principal and made defence in the original suit. The court allowed to the defendant, to be deducted out of the monies in his hands, the cost he was at in defending his principal in the original action.

Bostwick vers. Bogardus.

A book of the statutes of the state of New-York printed by a private printer, not admitted as evidence of the statutes.

ACTION on book, for a quantity of flour delivered in A. D. 1778, in the state of New-York, to which both parties belonged.

Plea—owe nothing. Issue to the jury.

The defendant offered to give in evidence a statute of limitations of the state of New-York, to cut off the plaintiffs' demand ; which he said was in a book rinted by — Greenleaf, being a book of statutes of said state of New-York. This was objected to, that the statute being printed in this book was no evidence that it was genuine ; and by the court not admitted. The court is bound to know the laws of this state, and of the United States ; but the particular municipal laws of the particular states, this court are not presumed to know. They must be alledged and proved, like any other matters of fact or of record, by legal authenticated copies.

Crocker *vers.* Waldo.

ACTION, declaring upon the statute for appointing of sheriffs, &c. That the defendant was a constable of the town of Sharon, and that on the 10th of March 1794, the plaintiff delivered to him an execution in his favor, against Simeon Smith for £20-15-9 lawful money damages, and £6-11-4 cost; dated the 4th of February 1794, and issued on a judgment of the superior court, and returnable in 60 days. That the defendant had never levied or served said execution; and that said judgment and execution remained unsatisfied, to his damage £36, which he demanded together with the penalties of said statute imposed on officers for not doing their duty.

An action lies upon the statute against an officer for not executing a writ of execution, and judgment may be given for damages only.

The defendant demurred to the plaintiff's declaration; and judgment that the plaintiff's declaration was sufficient, and for the plaintiff to recover his damages. The court did not set any fine upon the officer. The exception taken under the demurrer was, that the statute on which this prosecution was founded, extended not to executions, but to writs on mean process,

By the court—This declaration is in usual form against the defendant, for not doing his duty upon a certain writ of execution, whereby the plaintiff says he is damaged £36—this he demands; and also makes a demand that the court would set a fine upon the defendant. Whether this be a case in which the court will fine the defendant or not, it is very clear, that the plaintiff has shewn enough to entitle him to his damages—but the court do not at present see reason for making the distinction contended for by the defendant. The statute is that sheriffs and constables shall receive all manner of writs; and any person delivering any writ, may demand a receipt, and if any sheriff or constable shall not execute the writ, &c. on complaint made to the court to which it was returnable, the court may set a suitable fine on him: No distinction is made by the statute, between writs of execution and other writs.

Guernsey vers. Morfe.

A defendant in an action of assault and battery is confined in his proof of the provocation, to what happened at the time of the assault.

ACTION of assault and battery. Plea—Not guilty. Issue to the jury.

In this case a question was made to the court, whether the defendant may give in evidence any words spoken by the plaintiff, previous to the time of the assault, in order to show a provocation.

By the court—He may not, unless it be to explain something which was then said—it would otherwise be unintelligible to the tryers.

Johnson, &c. vers. Moor.

A deed of a piece of land said to contain fifteen acres, referring to the record of a deed of the same piece of land to the grantor, will not support an action on the covenant of warranty, although the land falls short of the quantity mentioned and expressed.

ACTION on covenants in a deed, declaring, that the defendant in and by a certain deed, dated the 20th day of March A. D. 1784, bargained and sold to Archibald Johnson, deceased, father of the plaintiff, several pieces of land; which deed was, that for the consideration of five hundred and fifty pounds, the defendant bargained and sold several pieces of land to said Archibald Johnson—first piece containing eighty acres more or less, which was deeded to the defendant by his father Jonathan Moor, late deceased, on the 18th day of August A. D. 1755, and recorded in Salisbury, third book of records for deeds, page 342 and 343. One other piece containing fifteen acres, deeded to him by Joseph Williams, on the 5th of November A. D. 1764, and recorded in Salisbury, fourth book of records, page 64. And four pieces distributed to the defendant out of his said father's estate, containing seventy three acres and twenty eight rods of land, as may be seen in the records of the court of probate for Sharnbrook district. Also one other piece, containing thirty acres and one hundred and two rods of land, conveyed to him by his said father on the 28th day of March A. D. 1764, and recorded in Salisbury, fourth book of records for deeds, page 31, being all the lands he owned in Salisbury—and in and by said deed the defendant covenanted that he was

well seised, and had good right to sell in manner aforesaid; and that the same was free of incumbrances. Also covenanted to warrant the above granted premises.

The breaches assigned were, that said fifteen acre piece contained but twelve acres; that said four pieces of land said to contain seventy three acres and twenty eight rods, contained but sixty five acres; that said piece which was said to contain thirty acres and one hundred and two rods, contained only twenty five acres; so that said pieces of land fell short sixteen acres in the whole, of the quantity warranted in said deed—and the defendant had failed to keep his covenants in said deed.

The defendant demurred to the declaration. And judgment—That the declaration was insufficient.

By the court—The deed contains no express covenants as to the quantity of any of the pieces of land conveyed; but is of one piece of land containing fifteen acres, which was deeded to the defendant by Joseph Williams, on the 5th of November 1764, and recorded in Salisbury book of records. The purchaser is referred to Joseph Williams's deed for the description of the land; and all that is comprehended in that deed was conveyed to the plaintiff. The same reasoning applies to the other pieces of land; the deed of the four pieces of land distributed to him out of his father's estate, refers to the records of the court of probate; and said four pieces of land so conveyed are said to contain seventy three acres and twenty eight rods; but there is no covenant that they contained so much, so far from it that the grantee is referred to the records of the court of probate to find the quantity—and so of the thirty acre piece reference is made to his father's deed for the description of the land. Whenever a deed is given of a piece of land contained in another deed, with a reference to the other deed, the land contained in the deed referred to, is the land granted, however the quantity may be miscalled, unless there is an express warranty of the quantity.

HARTFORD COUNTY,

*Hartford County, September Term, A. D. 1795.*Pettibone *vers.* Gozzard.

The verdict
must answer
the whole that
is put in issue.

ACTION of ejectment for two pieces of land, particularly described in the declaration.

The defendant plead generally that he had done no wrong or disseisin.

Issue to the jury—and verdict that the defendant had done wrong and disseisin to the plaintiff, as to one piece of the land particularly described in the verdict, and found for the plaintiff to recover the seisin and possession of said piece of land. But the jury in their verdict made no mention of the other piece of land; a motion in arrest was made that the verdict ought to have answered the issue as to both pieces of land. Judgment, that the motion in arrest was sufficient, and a repleader ordered. 3 Salk. 373.

By the court—The verdict must be an answer to the whole of the matters put in issue; the jury have found that the defendant had done wrong and disseisin as to a part of the land, as to the other piece of the land they are silent; whereas they ought by their verdict to have answered that part of the issue. Root's Rep. 1 vol. p. 163. Scot *vs.* Turner.

Daniel Sheldon, &c. children and heirs of Daniel Sheldon, deceased *vers.* Joseph Woodbridge and the heirs of Isaac Sheldon, deceased.

Lands pledged as security for a sum of money by an absolute deed, upon a parol agreement that they may be redeemed by payment of the

PETITION in chancery, shewing that said Daniel, deceased, on the 6th of January, A. D. 1771, borrowed of John Robbins £46 lawful money, and to secure the payment, he gave a deed of sixteen acres of land to said Robbins, worth £160; the consideration expressed in said deed being £46 lawful money, and was and is the only consideration of said deed; that it was the intent and understanding of

both said Daniel and said John, that said deed was only for security, and to be given back or said land released, upon said money and interest being paid ; and in confidence of said John's integrity, said Daniel gave said deed without any written condition being annexed to it or taking a defeasance. That in April, 1771, said Daniel was taken sick and languished until the 8th of August 1772, when he died, leaving the petitioners and Lucy the present wife of said Woodbridge, in their minority.

That on the 2d of November, A. D. 1772, administration of said Daniel's estate was granted to said Isaac Sheldon ; upon which he took the estate of said Daniel into his hands, amounting to more than £200; and being fully acquainted with the afore said facts, on the 13th of February 1773, applied to said Robbins, for a release of said 16 acres of land, upon his paying the sum loaned, and the interest ; and to enforce upon said Robbins his claim, he urged the understanding between him and said Daniel, at the time of executing said deed, and that he was acting for said minor heirs, and for their use and benefit, and the damage it would be to their estate, if it should be refused. And said Robbins, conscious of the justice of the claim, as it respected said Daniel's heirs, and recognizing said agreement, and confiding in said Isaac, that he would convey said estate to said heirs, when they should come of age, upon being reimbursed the sum he should pay, did on said 13th of February make and execute to the said Isaac a deed of release or quitclaim of all his right, title and interest in and to said 16 acres of land, upon said Isaac's paying to him the sum loaned to said Daniel and the interest only. Upon which said Isaac entered upon said land and took the improvement until his death, which happened in April 1786, which was worth £12 per annum ; and upon his death said land was entered upon by his widow, and afterwards distributed among said Isaac's heirs ; whereby the petitioners were deprived of the same—praying that upon the petitioners' paying whatever should be found justly due to said Isaac's estate—after the death of the grantor his administrator knowing of said agreement, redeems said lands on the ground of said parol agreement for the benefit of the heirs, they being minors, and takes a deed to himself—he will be compelled in chancery to convey said lands to said heirs, upon being paid what is due him on account of his advancement for the lands.

HARTFORD COUNTY,

tate for the money paid by him as aforesaid to said Robbins, the heirs of said Isaac be decreed to re-convey to the petitioners said 16 acres of land.

To this petition a demurrer was given, by way of abatement. In arguing the demurrer it was contended by the respondents that this was an absolute estate in said Robbins, and not redeemable by said Daniel or his heirs, and that said Isaac purchased and held it as an absolute estate, to himself and heirs.

Judgment—That the petition was sufficient.

By the court—Under this demurrer every thing that is well and sufficiently alledged is admitted. The agreement between said Daniel and said Robbins, is stated to be by parol, and although said Daniel had no remedy against said Robbins in law or equity, and must rely entirely on his honor and conscience; yet said Robbins having acknowledged said agreement, and his obligation to perform it, and in fact having carried it into execution, by releasing said land to said Isaac, as the friend and trustee of said minor children, and for their use and benefit, upon the said Isaac's having claimed it for them, and for their use; and on that consideration only he had obtained a deed as is alledged in said petition. The agreement made by said Daniel with said Robbins is by him confessed and executed, by giving the deed to said Isaac as aforesaid; and for said Isaac to represent to said Robbins that he was the friend of said minors, and acting wholly for their benefit, and thereby obtain the land from said Robbins, as is stated in said petition, when he was getting it for himself, without suffering them to have the benefit of it, was a gross fraud and breach of trust, practised upon said Robbins, to the prejudice of said heirs, against which they ought to be relieved.

Upon the trial of the petition the petitioners offered the deposition of the said John Robbins, to prove the facts alledged in the petition. This was objected to, both on common law principles, and on the ground of the statute—1st, because no parol evidence was admissible to contradict or explain a deed—2d, that



John Robbins was a party to both the deeds. The one he gave to Isaac Sheldon was a quit-claim only, yet he may not be permitted to say any thing to invalidate his own deed.

By the court—The deposition may be admitted; by John Robbins' confessing that the deed from Daniel Sheldon to him was in nature of a mortgage, that the land was to be reconveyed upon his being paid his principal and interest; and his actually doing this, as he in fact did, by the quit-claim deed he gave to said Isaac Sheldon, all the mischiefs are avoided, which the statute was designed to prevent—and his testimony does not contradict his deed to said Isaac; for whether said Isaac obtained the deed from said Robbins in behalf of the heirs of his brother Daniel, and for their use, or for himself, the deed has its full operation. In either case said Isaac is completely vested with the legal estate, and this is admitted by the petition—and these are questions of fact; if the first, it was a fraud practised upon Robbins in order to obtain the deed to himself; and equity will consider said Isaac as a trustee to said heirs, and holding said estate for their use, as he declared himself when he obtained said deed. A bill of exceptions was filed against admitting any parol evidence, as well as that of said Robbins. The petition was heard and granted. This decree was affirmed in the supreme court of errors.

Harrison Gray *vers.* Webb and wife.

PETITION for a foreclosure of the equity of redemption in certain mortgaged premises.

A petition for a foreclosure of the equity of redemption, is abated by the death of the petitioner.

An interlocutory decree passed last court for the examination of the petitioner on oath; which had not been executed, his residence being in Great Britain; and since the last continuance said Gray had deceased. A question was made whether the suit was abated, or may be taken up and prosecuted by his representatives.

HARTFORD COUNTY,

By the court—The suit is abated by the petitioner's death.

Pettibone, administrator of Lemuel Roberts *vers.*
James Roberts.

Where a note is indorsed blank for indemnity, and the indorsee is indemnified, yet has received the money on the note—an action of indebitatus assumpsit will lie to recover the money back—and parol evidence admitted to prove the consideration of the indorsement, and that it had failed.

ACTION of indebitatus assumpsit for money had and received of Woodruff and Kilborn on the 20th of May A. D. 1790, for the use of said Lemuel, which the defendant had never paid.

Plea—non assumpsit. Issue to the jury.

In July A. D. 1788, Lemuel Roberts, was possessed of a note given by said Woodruff and Kilborn, to Timothy Moses, for £50 lawful money, on interest, dated the 15th of August 1786, which was the property of said Lemuel—said Lemuel delivered this note to said James Roberts, with his name signed blank on the back of it; this note afterwards came into the hands of said Lemuel, and was handed over to Alexander Wolcott, attorney, and put in suit at Litchfield county court. In October 1788, said Lemuel wrote an order to said Wolcott, to deliver said note to the defendant, or the avails of it, and warranted said note to be good and collectable. Further, the defendant after he had received the money on said note, and a suit was commenced against him for it, got the note out of Litchfield court files, and filled the blank over said Lemuel's name with an assignment of said note to himself with warranty. This all appeared on the trial. It was also admitted that the defendant had received the money of said Woodruff and Kilborn.

The plaintiff offered parol evidence to prove that this note was delivered to the defendant for no other consideration but to indemnify him against a certain bond, the defendant had given for said Lemuel, respecting some suits in the law; and that all those matters were settled by said Lemuel, and the defendant had been fully indemnified, long before his receiving said money; and that the consideration for which

said note was delivered, and made over to the defendant, had wholly failed.

This evidence was objected to by the defendant, because it would go to contradict written evidence, by parol. The evidence was admitted.

By the court—This evidence does not go to contradict the writing, but to prove a fact wholly independent of the writing, viz. that the consideration on which said note was delivered and assigned to the defendant, had failed, and that the defendant had no right in justice and good conscience, to have and hold said money; for a blank endorsement has no determinate meaning until it is filled up, and the endorsee has no right to fill it up with whatever he pleases, after a suit is commenced against him for the money, as the defendant had done in this case. The jury found that the defendant did assume and promise, and for the plaintiff to recover said money, and judgment was accordingly.

A bill of exceptions was filed against the opinion of the court in admitting said testimony. This judgment was afterwards affirmed in the supreme court of errors.

James Stanly *vers.* Jacob Ogden.

SCIRE FACIAS against said Ogden, as agent, trustee and debtor, to Rowlet, Corp and company, absent and absconding debtors, declaring that the plaintiff commenced an action against them for a malicious and vexatious suit, describing them to be absent, absconding debtors, and served the defendant with a copy of said suit on the 31st day of December, A. D. 1791, and that afterwards he recovered judgment against said Corp and company in said action, before the superior court held in Hartford, on the second Tuesday of February A. D. 1794, for the sum of £230 lawful money debt, and for £18-6 cost of suit; that he immediately after prayed out execution on said judgment, viz. on the day of February A. D. 1794, by which, demand was made upon the defend-

A plaintiff may have remedy by foreign attachment, to recover damages for a vexatious suit.

This judgment was reversed by the supreme court of errors.

HARTFORD COUNTY;

ant, and said execution was duly returned non est inventus, within sixty days, and that said judgment and execution remained unsatisfied—praying for a remedy against the defendant.

The defendant plead in bar of any recovery against him in this suit ; that the original action brought by said Stanly against said Rowlet, Corp and company, of which the defendant was served with a copy, was an action founded on a tort, in which he charged them with having prosecuted him in the law unjustly, with a malicious and vexatious suit ; and was not for any debt or duty founded on contract, and set forth the action ; that the statute did not extend to such a case, but was only to enable creditors to recover debts due from their absconding debtors, out of the hands of their agents, attorneys, trustees or debtors, and did not extend to enable any person to recover damages out of the effects of a person absconding, for torts or trespasses committed by him.

The plaintiff demurred to the defendant's plea in bar. And judgment of the court, that the defendant's plea in bar was insufficient.

By the court—The statute on which this process is founded, is a remedial law, made to provide a farther remedy in favor of persons having demands upon others, than is provided by the general law of attachments—by that statute the plaintiff could take hold of nothing but the visible property of the defendant, or his person, whereby there might, and often was, a failure of justice ; for persons with a view of defrauding others would conceal their effects in the hands of an agent or trustee, or in the hands of a debtor, and abscond ; so that neither their effects or person could be got at. To remedy this mischief, the law entitled, an act for the recovery of debts out of the estate or effects of absent or absconding debtors, was made.

This statute is evidently designed to remedy the mischief which existed previous to the making of it. And the only question is whether it meant to provide a compleat and perfect remedy, or only a partial one ?

Reason and justice require that it should be perfect, and extend to all cases ; for the man who has had his bones broken, his property taken from him, or destroyed, has as just a title to compensation in damages by law as the obligee in a bond has to the money due by it, and is entitled to the same legal means of securing and recovering it. And the only objection to this, arises from the terms creditor and debtor, made use of in the title, the preamble, and in the act itself. It is entitled an act for the recovery of debts out of the effects of absconding debtors.

The preamble is, for the better preventing fraud, &c. sometimes practised by ill-minded debtors, who betrust their estate and effects in the hands of others, with intent thereby to defeat their creditors of their just dues. And it is enacted, that it shall and may be lawful for any creditor to cause the lands and effects of his absent or absconding debtor to be attached, &c. and where no lands, &c. of an absent absconding debtor in the hands of his attorney, &c. shall be exposed to view, or can be found or come at, so as to be attached, it shall and may be lawful for any creditor, to bring his action against his absent, absconding debtor to recover his dues.

Remedial statutes and statutes made for the prevention of fraud, are to be construed liberally and beneficially, in advancement of the remedy, and for the suppression of the mischief—this statute partakes of the nature of both.

What is the meaning of the term creditor, in legal understanding ? In a strict literal sense it is he who voluntarily trusts or gives credit to another, for a sum of money or other property, upon bond, bill, note, book, or simple contract. In a more liberal sense he is a creditor who has a legal demand upon another, for money or other property which has got into the hands of another, without his consent, by mistake or accident, which he is entitled to have, or to a compensation in damages for, upon the ground of an implied promise.

In the more general and extensive sense of the term, he is a creditor, who has a right by law to demand and recover of another a sum of money on any account whatever. If a man takes another's purse, or another's horse, or destroys another person's timber and the like, the person injured has a right to demand and to recover a just compensation for his damages—because in the first place it is just ; and in the second place, the law creates an obligation upon him to make such compensation. And the obligation upon a person to pay for money or other property stolen or taken in trespass, is as great as where the goods are obtained by accident. The difference is, that if the action is brought for the tort as well as for the property, the law will give not only compensation for the goods taken or destroyed, but in addition will give damages for the tort or injury. This case was an action brought by Stanly against Corp and company, for a vexatious suit, in which they recovered a large sum of money of him, for a debt which had been paid, and in this action he claimed and recovered for those payments which had not been applied, and also an additional sum for the unjust vexation—for the payments which had not been applied, he might have had an action of *indibitatus assumpsit*. The form of the original action shewed, not only that he was a creditor, but that the defendants were debtors, for the payments which had not been applied, and damages were recovered for them.

A debtor is one who owes another any thing, or one who is under obligations, arising from express agreement, implication of law, or from the principles of natural justice, to render and pay a sum of money to another. In this liberal and extensive sense the terms creditor and debtor, were undoubtedly meant and intended to be understood by the statute ; for the expressions are, any creditor may bring his action against his absent or absconding debtor, to recover his dues, where no property can be come at so as to be attached ; at the same time the distinction is ever to be kept up between the causes of action, viz. those

which arise from breach of contract, express or implied, and those which arise from a tort; this is necessary, for the sake of both form and substance; yet this can have no effect to narrow the construction given to the terms used in the statute.

If the object of the statute was to provide a remedy against the invisible or concealed property of persons absconded, in the hands of their agents, &c. in all cases as extensively, as before was provided by attachment against the visible effects of persons not absconded, and there is scarcely room for a doubt but what that was the object of the statute; then this case is clearly within the reason and the terms of the statute, and the terms creditor and debtor in the statute mean any person who has a legal demand upon another, and any one who is liable to such demand.

The reason of the law is the life of the law, and every case that is within the same reason, is within the same remedy, although not within the letter of the law. And so the supreme court of errors have determined. See the case of *Laight v. Tomlinson*, ante. In which it was determined that a demand must be made upon the garnishee, within sixty days from the judgment against the principal, because, though not within the letter, yet it was within the reason of the law.

This judgment was reversed in the supreme court of errors in June A. D. 1797, for the following reasons, viz.—

The question which arises in this record is this, whether the defendants in the original action who were described in the declaration, as absent, absconding debtors, were such in the sense of the statute above referred to, or not? If they were, then their goods, or effects in the hands of Jacob Ogden the defendant, in the *scire facias*, were holden to respond the judgment as far they might extend, and his plea in bar would be insufficient, as adjudged by the superior court—otherwise they were not holden, and his plea in bar was good and sufficient. That Rowlet,

the sum arises on delivery of goods to account, &c. nor is this action grounded on debt, as the term is technically understood, nor indeed does the common and technical use of the word differ much, if at all. A demand like this could not be received and allowed by commissioners against an estate represented insolvent, but they certainly have a right to allow all debts due from such an estate. Neither could it be proved before commissioners of bankrupts, where the demand is against the bankrupt; nor could it be recovered by such commissioners where the demand was due the bankrupt; and this has in effect been settled by the superior court in this very case, in over-ruling the plea in abatement, which Rowlet, Corp, &c. put into this action, grounded on the insolvency of the plaintiff, and the commission of bankruptcy which had been granted thereon by the general assembly; the principle of which plea seems to have been, that it belonged exclusively to the commissioners who were by the act appointing them, authorized in their own names, to sue and pursue to final judgment and execution, all the credits of the plaintiff. The act authorizing the commissioners to sue for all credits due the bankrupt, or which is the same thing for all debts due from others to him, and therefore his process ought to abate, he being dead in law, as to maintaining this action; but the superior court adjudged that he might maintain this action, which was the same as to adjudge that the action was not brought to recover a debt due from the defendants—the consequence is, that the defendants in the original action were not debtors, either in common understanding, or in contemplation of law; unless indeed they are to be considered such by the true construction of the statute aforesaid. The statute makes provision for securing goods or effects in the hands of the attorney, factor, agent or trustee of absent or absconding debtors in terms, and of none else. The only question that remains then is, whether the courts of law can give the statute a liberal construction, or can extend it beyond the letter of it.

If it should be urged that this is a remedial statute



and that it ought to receive such a construction as to prevent the mischief and to advance the remedy, in cases which come within the equity, though not within the letter of it ! The answer is, that the remedy provided by the statute is affected by abridging the common law rights of both creditor and debtor ; of the creditor, in preventing his calling upon his debtor, factor, agent, &c. for his debts or effects ; and of the debtor, factor, agent, &c. in preventing his accounting and exonerating himself with his creditor or principal, according to the nature of his contract and the course of the common law ; and in subjecting the one to loss by delay of payment, and the other by accumulation of interest, or to hazard and risk arising from opposing claims upon him, created by the statute ; and from the dubious operation of the statute, which he must understand, at his peril, though his learning, and abilities may be very inadequate to it. This being the case the statute must be construed strictly, for the rights of men must not be taken away by implication, or construction, without express provision of law ; and it would be no less arbitrary for the courts of law to extend the statute and to spread it over cases not literally within it, than it would have been to adopt by their own authority the present provisions of it, in case the statute had never been made.

Whitman vers. Wadsworth.

ACTION of indebitatus assumpsit, declaring that on the 20th day of April A. D. 1789, Joseph Chapin, Silas Pepoon, Ebenezer Kingsbury, and William Walker, executed to the plaintiff and defendant their note, in the words following, viz. " We the " subscribers, for value received, jointly and severally " promise to pay unto Messrs. William Wadsworth " and Samuel Whitman, or their order, three thousand six hundred and nine pounds, fourteen shillings and seven pence lawful money, in twelve months, with the lawful interest. Dated the 20th " of April A D. 1789."

Where an action of account and not assumpsit should be brought.

Proof of special circumstances not admitted to prove a general action of indebitatus.

That said note was intrusted with the defendant, and that on the 1st of July A. D. 1790, he applied to the promisors in said note, and they paid him the full contents of said note, with the interest, amounting to £3867-17 lawful money, which the defendant received, and then delivered up said note to the promisors to be cancelled; whereby the defendant became indebted to the plaintiff the sum of £1933-18-6, being the one half of the sum had and received on said note for his use; and thereupon he became liable to pay the same to the plaintiff, and being so liable and indebted, assumed and promised.

Plea—Non assumpsit. Issue to the jury.

The plaintiff to make out his case stated, that the plaintiff and defendant were jointly bound to H. Champion, Esq. in the aforesaid sum, for said Chapin and others, and that said note was taken for their indemnity; and that the defendant being intrusted with the keeping of said note, had received the greater part of the money due thereon, and delivered up said note, and had not paid said Champion the whole of his debt; but that the plaintiff had been compelled to pay in land and otherwise, to said Champion, about £500, which the defendant ought to refund to him.

Objection was then made by the defendant to the plaintiff's proving this statement, in order to make out his case. 1st, That the plaintiff and defendant were joint owners of the note, and the monies received thereon, and that an action of account and not indbitatus assumpsit was the proper action. 2d, It would lead the court into a lengthy examination of an account between said parties, in which the defendant had right to his oath; for in collecting said monies and delivering up said note, the defendant acted as attorney to the plaintiff.

By the court—The plaintiff cannot make out his case by proving the stating he has made—for it would necessarily lead the court into a lengthy examination and adjustment of the accounts between the parties, being the proper business of auditors.

Windham County, September Term, A. D. 1795.

Samuel Cafey *vers.* John Cafey.

ACTION on note, dated January 28th, 1785, for £100, payable to plaintiff or order.

A plaintiff may discharge an action in his name, brought upon a note, notwithstanding said note is assigned, and the plaintiff insolvent.

Plea in bar—That on the 18th of September 1794, the plaintiff made and executed to the defendant a certain writing or discharge as follows, viz. “Be it known unto all whom it may concern, that my brother John Cafey of West Greenwich, has this day settled with me, and we find a balance due me of ten shillings, which I have this day received, which is in full of all demands I have against him, either by bond, note, book, account, judgment of court, or execution, or demand of what name or nature soever, from the beginning of the world to this date. Samuel Cafey.” Whereby the defendant was wholly exonerated and discharged from said note.

The plaintiff replied, that long before the date of the plaintiff's writ, and date of said discharge, said note was for a valuable consideration assigned to John Hazzard and Ruth Cafey, whereby the property of said note was vested in them—Soon after which, said Samuel Cafey became bankrupt and fled to Nova Scotia, to avoid his creditors; and that said assignment was made at West Greenwich in the state of Rhode Island, where all the parties lived, and by the then existing laws of that state, said note was negotiable and an action sustainable thereon in the name of the assignee; of all which the defendant had due notice, before the date and service of the plaintiff's writ; yet the defendant with design to defraud said assignees, after the commencement of this suit, pursued said Samuel to Nova Scotia, where he procured said Samuel to execute said discharge by fraud, for the purpose of depriving the assignees of their just property, without paying any thing therefor.

The defendant demurred to this reply—and judgment, that the reply of the plaintiff was insufficient.

By the court—This action is in the name of Samuel Casey, and the discharge is given by him; he must be competent to discharge an action brought and pursued in his name. If the defendant has practised any fraud upon the assignees in this case, he will be liable for it; or if the assignment was made in the state of Rhode Island, where, by the then existing laws of that state said note was negotiable, as is alleged in the reply; the court see no reason why an action may not be brought and maintained on said note in this state in the name of the assignees against the promisor.

New-London County, Sept. Term, A. D. 1795.

Jonathan Richardson, son of Amos Richardson, and grand-son of Jonathan Richardson, deceased *vers.* Frink and others.

In an action of ejectment, a deed from an administrator on an insolvent estate, is not to be attacked by evidence, to prove that the claims allowed by the commissioners were not just.

ACTION of ejectment for a tract of land described in the declaration.

The defendants plead that they had done the plaintiffs no wrong or disseisin. Issue to the jury.

The defendants being in possession of the premises—The plaintiffs' title was a deed from his grand-father to his father Amos, and a deed from his father to Robert Kennedy and a deed from said Kennedy to himself.

The defendants' claim, that the deed from Jonathan the grand-father to his son Amos, was a voluntary conveyance and given to defraud his creditors. That upon the death of the grand-father intestate, Zalmon Treat Richardson was appointed his administrator; that said estate was represented and found to

be insolvent, and orders given to the administrator to sell the estate, who accordingly sold said land to the defendants.

The plaintiffs claimed that said estate was not insolvent, but was made so by a large demand set up by said administrator in his own favor and which he procured said commissioners to allow to him against said estate, when in fact there was little or nothing due to him, and offered evidence to prove that the administrators' claim was unjust.

The defendants objected against the admission of this testimony; and by the court, the evidence may not be admitted in this action—but the proper remedy would have been for the heirs or the creditors to have appealed from the judgment of the court of probate accepting the report of commissioners, and in that stage of the business, they would have had right to have contested the claims of the administrator.

Luther Spalding *vers.* Ebenezer Spalding.

ACTION for a legacy, declaring, that Ebenezer Spalding, deceased, in and by his last will, dated 22d of January A. D. 1793, since proved and approved, gave the following legacy to the plaintiff, viz. "Item, my will is, that after my decease, all my real estate shall be appraised, by indifferent men, at its true value in money; that £100 already received by my son Ebenezer, be added to the price of my real estate, the one half part of that amount I give to my youngest son Luther; only first deducting out of his half part aforesaid, the amount of a note given by said Luther to my son Afa, for about £100, for which I gave security. Now if my son Ebenezer, pay said Afa his said note, and also pay to said Luther such sum of money as shall remain, after deducting said note out of his half part as aforesaid, then my son Ebenezer shall have and hold all my real estate to him and his heirs."—That said Ebenezer the testator, died on the 18th of June A. D. 1794,

A bequest of one half of a man's real estate at appraisal in money, is the one half without any deduction for debts. Where a matter is equally the interest and duty, and equally in the power of the defendant to know as of the plaintiff, special notice is not necessary.

and his will was proved and approved—that the real estate of the testator was appraised after his decease at £830 lawful money, to which being added the £100 advanced to said Ebenezer, made £930, half of which would be £465—That said Ebenezer immediately after the death of the testator, entered into the possession of said real estate by force of said will, and thereupon became liable to pay to the plaintiff said legacy, amounting to £465 and interest, and in consideration thereof assumed and promised:

The defendant plead in abatement, that the testator had ordered in his will, that all his debts and funeral charges should be first paid out of his estate—that said estate was not settled, and that the debts and charges surmount the personal estate; and that on the 8th of June 1795, the defendant being one of the executors of said will, obtained an order from the court of probate to sell so much of the real estate of said deceased as would raise the sum of £175-0-6 lawful money; and said land was not sold nor said debts paid; it therefore could not be ascertained what sum the plaintiff would be entitled to under said will.

The plaintiff demurred to the defendant's plea in abatement. And judgment—That the plea was insufficient.

The defendant then plead that he did not assume and promise. Issue to the jury.

The jury found a verdict for the plaintiff, that the defendant did assume and promise, and for the plaintiff to recover.

The law question made in this case was, whether upon the construction of this will, the plaintiff was entitled to one half of the value of the whole real estate of which the testator died seised, or only of the half of the value of his clear real estate after payment of debts.

By the court—The intent of the testator is so explicit, that there is no room left for construction. The sum he gives to Luther he charges upon the real



estate given to Ebenezer, and makes it the condition upon which Ebenezer is to have the estate—and it is the one half of the value of his real estate, after his decease, in money at appraisal; and of the £100 advanced to said Ebenezer. It is not said after payment of debts, but after my decease; and Ebenezer had his election to accept the estate or not; he has elected to accept the estate thus charged, and has thereby agreed to pay the legacy.

The defendant made a motion in arrest of judgment, for the insufficiency of the declaration, because it was not averred in the declaration that notice had been given to the defendant what said estate was appraised at—and cited Douglass 654, *Rushton vs. Aspinal*. Judgment—That the motion in arrest was insufficient, and for the plaintiff to recover.

In the discussion of this motion, two points came up—1st, Whether it was necessary that notice should have been given—and 2d, If necessary, whether the defect was not cured by the verdict. If notice was necessary, then the case in Douglass is in point; for it not being alledged in the declaration, it was not necessary to be proved, and the verdict therefore does not cure the defect. In this case it was the duty of the defendant as well as his interest, to have the real estate appraised, that he might know what he had to pay the plaintiff to secure the estate. It is alledged, that the real estate was appraised by indifferent men at £830, the presumption is, that it was procured to be done by both plaintiff and defendant; had there been any unfairness in the appraisement the defendant might have availed himself of it on the merits—for it was essential to the plaintiff's action that the estate should have been appraised by indifferent men—and where the thing to be done is the duty of the defendant to do, and is equally in his power to know as the plaintiff, notice is not necessary.

Spegail *vers.* Perkins and others.

Copies of record attested by the register of the court in a foreign jurisdiction, not admitted to be given in evidence without a certificate of the judge that he is the register.

The certificate of a notary is received as evidence, without proof of his being such, from necessity and universal consent.

ACTION of trover, for eight hogheads of coffee. Plea—Not guilty. Issue to the jury.

Copies of record from the West-Indies were not admitted to go to the jury, because they were not duly authenticated; being certified by the register of the court, without any seal, or certificate of his being register, by the judge or other proper officer.

The protest made by the captain of the vessel in the West-Indies, before a notary public was admitted; although objected to that there was no evidence that the person who certified said protest, was a notary duly appointed.

By the court—This stands on different grounds from that of a copy of record, for faith and credence is by the universal consent of all nations given to the attestations of a notary public, from the necessity of the case; and although the official certificate is evidence that the protest was made, yet the protest may be contested.

George Minor, &c. heirs of Samuel Minor, deceased *vers.* Samuel Woodbridge, Ebenezer Punderfon, &c.

Where a redemption of an estate is claimed on the score of fraud, in not executing a bond of defence agreed upon, a reply, that such bond was executed, but by accident was lost, is a departure, and on demurrer bad.

PETITION in chancery, shewing that on the 23d of December, A. D. 1763, said Samuel Minor gave a deed of one hundred and thirty acres of land to Daniel Denison, as a security to indemnify him against a joint and several bond given by him with said Minor to certain persons in New-York, for said Samuel's own proper debt, for the sum of £185-13-6 lawful money and interest; and took a bond from said Denison, to recover said land upon his being indemnified by said Samuel from said bond, given in New-York; that on the 17th of May, A. D. 1764, said Denison in consideration that Ebenezer Punderfon would pay said £185-13-6 and interest,

released said lands to said Ebenezer Punderfon ; who undertook to get up said bond of defeasance from said Samuel Minor. That soon after, said Samuel Minor became embarrassed in his circumstances and unable to pay his debts, although his estate was sufficient, had it been disincumbered, being worth £1200 lawful money, and he was thrown into prison, and in that situation said Punderfon prevailed on said Minor to give up to him said bond of defeasance, without any consideration, only said Punderfon engaged to give a like bond to said Samuel Minor—and said Punderfon having got up from said Denison's said bond of defeasance, he held said estate without giving any new bond until the 14th of December, A. D. 1766, when he sold the same to Doct. Dudley Woodbridge, late deceased, for £405 lawful money, and gave a deed thereof to him—That said Woodbridge purchased said lands, well knowing all the circumstances relating to the several conveyances to Denison, and from Denison to Punderfon, also the bond given by said Denison to said Samuel, and said Punderfon's agreement to give a new bond on his receiving from said Samuel said Denison's bond—Further stating, that said Woodbridge possessed said estate during his life and took all the profits ; and upon his death it descended to his heirs and was distributed to said Samuel Woodbridge—that the improvements and rents since it came into the possession of said Dudley Woodbridge had been worth £60 per annum, and that said Samuel Minor was deprived of said lands for less than one quarter of the value ; that said Samuel Minor preferred his petition to the general assembly in May, A. D. 1774, stating the aforesaid facts—on which a committee was appointed, who met, heard the parties and agreed upon the facts stated in said petition ; but was prevented making any report, by reason of the war, and said petition upon the death of said Samuel Minor was discontinued ; and the petitioners being then young, poor and friendless, were unable sooner to prefer their petition—Praying that said Samuel Woodbridge be decreed to release to them said land, as the rents and profits greatly surmounted said debt and interest, or appoint a

Where a plaintiff has a good petition and a good case, but altogether mistaken, he may not by the statute of amendment substitute an entirely new and different petition.

NEW-LONDON COUNTY,

committee to hear and report, or otherwise grant relief.

The respondents plead in abatement of this petition—1st, That the widow of said Dudley and said Punderfon were interested and not cited—2d, That thirty years had elapsed since the giving of the first deed, and all the petitioners had been of age more than ten years—3d, That the petition was insufficient.

This plea was demurred to—and by the court judged to be in insufficient. The court do not usually abate a petition, because all persons interested are not made parties, but continue it, in order that they may be cited in.

Andrew Punderfon being cited in, plead in bar, that before the 22d of May A. D. 1765, he undertook to pay said debt for said Minor in New-York, for which said Denison was bound; and in consideration thereof, said Denison released said lands to him; and said Samuel Minor being also indebted to him in a further sum of ~~£110-16-3~~ 1-2 lawful money, and in consideration thereof and of his paying said debt in New-York, said Samuel Minor not being in prison, did freely and voluntarily on said 22d of May A. D. 1765, in and by a writing under his hand and seal for himself and heirs, assign over said bond to him said Punderfon, and thereby did release to him all right in said bond as by said writing, &c.—whereby he became vested with the whole right, title and interest in and to said lands, as an absolute estate in fee simple.

The petitioners replied, that upon said Samuel Minor's assigning said bond to said Punderfon, he agreed to give said Minor a similar bond of defeasance, upon said Minor's paying said Punderfon his debt and what he paid for him in New-York; and before said bond was given, said Punderfon wanted the money and applied to said Dudley Woodbridge to advance said £405 to said Punderfon—and to take a deed of said land from said Punderfon, which said Woodbridge did; and then and there executed a bond to said

Samuel Minor, conditioned to reconvey said land to said Minor, upon his paying said sum of £405 and interest—which bond was mislaid or by accident lost, and could not be produced ; but the petitioners were able to prove the existence and loss of said bond.

Demurrer to the reply—and judgment, reply insufficient.

The petitioners in their petition ground themselves upon the fraud of Punderfon in refusing to give a bond of defeasance as he had agreed ; and said Dudley Woodbridge's knowledge of it—but in the reply they lay the fraud out of the case, and ground themselves upon a bond of defeasance given by said Dudley Woodbridge to said Samuel Minor, in December A. D. 1766, which makes an entirely new case—they alledge indeed that said bond is lost, but that makes no difference, so long as it can be proved.

The petitioners then moved to amend their petition, and referred to the petition of Rogers, &c. two of the executors of James Rogers *vs.* Moor, the other executor, tried at New-London, September 1792—in which case after the petition was abated, and adjudged insufficient, the petitioners were allowed to amend by inserting certain material averments.

By the court—The petitioners may not amend, In Rogers' case the petition was insufficient for want of substance, which, by the amendment was inserted. In this case the petition is a good one, and was so adjudged—and to amend it according to the reply, is to make it a new petition and a new case altogether ; of which the respondents ought to have twelve days notice ;—for in this petition, the petitioners ground themselves upon the fraud of said Punderfon and said Woodbridge's being privy to it ; and this is what the respondents have been notified to defend against.—The amendment proposed lays the fraud entirely out of the question ; and makes a common case of it, and claims a right to redeem said estate upon the ground of a bond of defeasance, executed by said Dudley Woodbridge to said Samuel Minor.

Joseph Culver, &c. *vers.* Lemuel Culver.

An action of partition adjudged not to lie for lands to which the parties have title only in remainder after a life estate.

ACTION of partition, to have a certain tract of land, described in the declaration, of which the plaintiffs had right to six-sevenths, and the defendant one-seventh, aparted, &c. according to the above rule of proportion.

The defendant plead in abatement—1st, A misnomer of the defendant—2d, That the plaintiffs had not set out the proportions they held amongst themselves—3d, That the widow Culver had her life in the whole estate, without impeachment of waste, and was now living, and in the actual possession of the estate. The two first exceptions were waved by the defendant.

The plaintiffs replied to the last exception, that Joseph Culver, deceased, on the 5th of April A. D. 1776, made his will, and gave to his wife Eunice, all his real estate, during her natural life, without impeachment of waste; that the testator died, and his will was proved and approved; afterwards said Eunice executed a bond to the heirs, viz. the plaintiffs and defendant, conditioned to relinquish and wave all her right by said will in said estate, except a third of the personal estate, and one third of the real, during her natural life; in consideration that the heirs agreed that she should have and enjoy her thirds as aforesaid, and bound herself to perform said agreement—and thereupon that said writ ought not to abate. The reply was demurred to.

By the court—The plaintiffs' reply is insufficient—for it appears by the pleadings that the plaintiffs and defendant have only an estate in remainder, and not in possession, in the lands of which partition is demanded; for the bond and agreement of said Eunice without a deed, conveyed no title, the legal title to said estate is in her during her natural life; and it will be time enough for them to have partition of said lands when they shall have the possession and title.

Jonas Belton *vers.* John Avery.

PETITION in chancery, for the redemption of a mortgaged estate—shewing that on the 11th of December 1781, the petitioner gave a deed of forty acres of land to said Avery, for security of £260 lawful money; and that thereupon said Avery gave him a writing, dated the same day, as follows, viz. “This certifieth a bargain that I John Avery, 2d, do promise for myself, heirs, executors, &c. that upon Jonas Belton’s paying £260 lawful money, in Spanish milled dollars, unto me said John Avery, 2d, at my dwelling house, on the 11th of April A. D. 1783, and interest, then I am to give him a lawful authenticated deed of said forty acres of land; describing it as in said deed—this agreement not done “on said day is to be void—John Avery, 2d,”—which writing was recorded in the town records; that said land was worth £800; that said Avery immediately went into the possession, and had taken the profits worth £44 per annum—praying that the facts might be enquired into, and said Avery decreed to reconvey said land, upon the petitioner’s paying what was just and right.

Where it appears from the writings, that the deed was given as a security for the payment of money and not a sale, and import to be defeasible, the court of chancery will always consider and treat them as such.

Plea in abatement in nature of a demurrer. Plea judged insufficient, and the cause put to a committee.

The exception taken under the plea in abatement, was, that this was not a mortgage, nor of the nature of a mortgage, but a special agreement to convey said forty acres of land upon said Belton’s paying a certain sum of money, and the interest, by a certain time; if he performed he was entitled to a deed, if not his right was gone forever.

By the court—This writing is a defeasance executed evidently for that purpose; and shows that the deed to Avery, was a security for the payment of a sum of money, and not a sale; and whenever it appears from under the hand of the grantee, by bond or otherwise, that the nature of the transaction was a security only for the payment of money, the courts of chancery

have ever considered and treated them as such, according to the original intent of the parties, and allowed a redemption, as in case of a mortgage.

Samuel Brown *vers.* — Dye.

Natural children by the same mother are heirs to each other.

ACTION of ejectment for ten acres of land, described in the declaration.

Plea—no wrong or disseisin. Issue to the jury.

The facts in the case as agreed were: Thomas Brown was seised in fee of the lands in question, and on the 17th of March, A. D. 1761, made his will and therein and thereby devised to his sons, Samuel Brown and Fish Brown, all the remainder of his lands, to be their portion, with a good title to dispose of the same—said Fish and Samuel maintaining his aunt Thankful Holdridge during her life.

Thomas died, and his will was proved and approved. Samuel Brown was the lawful son of said Thomas—Thankful was sister of said Thomas's wife, and was never married—Fish Brown was the natural son of said Thankful, and the reputed son of said Thomas—Tabitha, the wife of the defendant, was the natural daughter of said Thankful, and sister by the mother, to said Fish Brown. Fish Brown died without wife, or children, or brother, or sister of the whole blood or parent living. The defendant was in claiming a moiety of said premises in right of his wife, as half sister, by the mother, to Fish Brown. The plaintiff contended that the defendant was a stranger, and had no title to any part of the premises in right of his wife, and though the plaintiff owned but half of the land, yet as tenant in common he had right to recover against a stranger. And as the defendant had not plead that matter in abatement, he could not take any advantage of it on the general issue; and that by the common law no bastard could be heir to another; at any rate the plaintiff ought to recover his moiety in this action—and referred to the case of Hillhouse, &c: *w. Mix*, at New-Haven, 1 vol. Root's reports, 246.



By the defendant it was contended that as the plaintiff had demanded the whole land, as being solely seised; although he might in such case recover a less number of acres, than demanded; yet he could not recover an undivided moiety, or any less quantity or proportion in the estate, than an entirety in whatever he did recover pursuant to his demand in his writ. That the case of *Hillhouse, &c. vs. Mix*, did not compare with this; for there the plaintiffs described themselves as tenants in common; and altho the defendant at the time of commencing the action had no right, yet pending the suit he purchased several of the plaintiffs' shares.

By the court—The statute, for the settlement of testate and intestate estates, governs the distribution and descent of real estates altogether in this state; and is express that when any person dies intestate, without wife or children, or brother or sister, of the whole blood as legal representatives of them, his estate shall go to his parents; and if no parents, to the brothers and sisters of the half blood. Fish Brown died intestate, without wife or children, brother or sister of the whole blood, or any legal representative of them, and without parents—The wife of the defendant is half sister to said Fish Brown by the mother, is admitted. The common law of England, which has been urged in this case, is not to be mentioned as an authority in opposition, to the positive laws of our own state; and nothing can be more unjust, than that the innocent offspring should be punished for the crimes of their parents, by being deprived of their right of inheriting by the mother, when there doth not exist amongst men, a relation so near and certain, as that of mother and child.

The jury found a verdict for the defendant, which was accepted by the court.

LITCHFIELD COUNTY,

Daniel Knowles *vers.* State.

The court must find the defendant guilty, and must give judgment against him, and not express it in the vague term of opinion.

ERROR to reverse a judgment of a justice on a complaint exhibited against him by a grand juror, for a breach of the peace.

To which Knowles plead not guilty.

The justice entered up his judgment as follows, viz. having heard the evidences, parties, &c. the court is of opinion that said Knowles is guilty—and is of opinion that he pay a fine of forty shillings, &c.

Errors assigned were—1st, That the justice had not found the defendant guilty—2d, That he had given no judgment against him for the fine.

Plea—Nothing erroneous. Judgment—Manifest error.

The law requires decision and rigid demonstration in matters of judgment; there must be at least, a moral certainty of the defendant's guilt, and the court must find him guilty; and until the court can find that, the defendant is not convicted; and the judicial sentence of a court never ought to be given in such loose and vague terms, but should be expressed in legal form, and with legal force and energy, as thus—This court give sentence or judgment, that he pay a fine, &c.

Litchfield County, November Term, A. D. 1795.

Joshua Church *vers.* Dewolf, Ranny, and Cassin.

In an action of trespass against several

ACTION of trespass, for an assault and battery. The Defendants plead severally not guilty. Issue to the jury.

After the evidence was gone through on both sides, the defendants Dewolf and Ranny, moved the court that the verdict might be taken as to Cassin, first and seperately, under an idea that he would be acquitted; that they might improve him as a witness in their favour.

The court all agreed, ~~that~~ where a person was made defendant ~~with~~ others in a cause, either of design or by accident, and who was a material witness for the other defendants, and against whom there was some evidence, so much that the court could not order him struck out of the writ; yet that the defendants ought to have some way to avail themselves of his testimony. In this case the court being divided, whether it should be in this way, or by a petition for a new trial, the case proceeded as usual; and the jury found Dewolf and Ranny guilty, and for Dewolf to pay £4-18, and Ranny £4-4—and that said Cassin was not guilty. The court returned the jury to a second consideration, because they could not sever the damages in this case. The jury then found the gross sum of £8-18 against Dewolf and Ranny.

defendants jointly, if the evidence against one of them who is wanted for a witness, is light, the court may take the verdict first as to him separately—or leave the other defendants to petition for a new trial.

Afa Bacon verf. Goodsell.

ACTION on a note given by the defendant jointly and severally with others, wherein for value received he promised to pay to the plaintiff 450 dollars, with interest. There was endorsed on the note 350 dollars.

A note for a premium of insurance on lottery tickets not void.

Plea—non-assumpsit. Issue to the jury.

The case was—the note was given for 100 tickets in New-Haven bridge lottery, at four dollars each; and to induce the defendant and the others to give the note on which, &c. the plaintiff gave them a bond, conditioned that they should draw 400 dollars in said lottery, including the deduction of 12 1-2 per cent. The net proceeds, viz. 350 dollars, should be endorsed on said note; and whatever they drew over 400



LITCHFIELD COUNTY,

dollars they should take their pay in goods out of the plaintiff's store.

The defendant contended that this was a wagering contract, *contra bonos mores*, and void.

Verdict for plaintiff, which was accepted by the court.

The contract is an insurance upon one hundred tickets, which the defendant with others purchased of the plaintiff at four dollars each. The plaintiff contracted that they should draw four hundred dollars in said lottery including the deduction of 12 and 1-2 per cent, for the premium of fifty dollars, secured in said note. The other part of the agreement, was merely in case the defendant, &c. should draw more than 400 dollars, that they should take their pay out of the plaintiff's store. The defendant, &c. did not draw four hundred dollars. The plaintiff endorsed on their note 350 dollars, the sum insured, and now demands the fifty dollars premium with the other fifty for the tickets, which the court did not consider as being an unlawful contract.

Bacon vers. Pettibone.

A note given for the purchase of land, and a bond taken for a deed when said note should be paid, is good and recoverable.

ACTION on note, dated the 23d of June A. D. 1786, for £25, payable in thirty six months, in wheat, &c. with interest.

The defendant plead in bar, that in June A. D. 1786, the plaintiff agreed to sell to the defendant a certain farm in Colebrook, called the Goodhue farm, for £184 lawful money, to be paid in seven annual payments, for which the defendant was to give seven notes; the first for £25 lawful money, payable in one year; and the plaintiff to give the defendant a bond for the sum of £400, conditioned to convey said farm to the defendant, upon his paying up said notes by the times therein specified; and on the defendant's declining to pay said notes, said bond to be void. That the defendant gave said notes, the note on which being



one, and then went immediately into possession of said farm, and continued to use and improve it, until the 24th of November A. D. 1792—the defendant being unable to pay up the notes which had become due, he chose to be off as to said bargain, as by the contract he had right to be, and notified the plaintiff of it, and that he should leave said farm; there being no other agreement respecting said bargain but what was contained in said bond and notes. That thereupon the plaintiff in November A. D. 1792, sold said farm to another person, for a greater sum; and that the plaintiff in writing notified the defendant that he had been informed by him that he should leave the Goodhue farm, and that he had accordingly sold it to another man, and desired the defendant to come and settle with him—and that the defendant quitted said farm in consequence of said sale; and that the note on which, &c. was one of said notes given for said farm; and the only consideration was a bond, and the defendant's entering and improving said farm as aforesaid.

The plaintiff replied, that he ought not to be barred without that, that the bond and the defendant's taking possession of the land, was all the consideration of said note, and that the bond and notes contained all the contract about said land—also without that the plaintiff sold said farm in November 1792, for a greater sum to another person, and that the defendant in consequence of said sale did quit said farm.

The defendant demurred to the plaintiff's replication—and the court gave judgment that the replication was sufficient, and for the plaintiff to recover.

By the court—Every thing is laid out of the case by the traverse in the plaintiff's replication, and the defendant's demurrer, except that the defendant purchased a farm of the plaintiff in June A. D. 1786, at the price of £184 lawful money, for which the defendant gave his notes payable in seven annual payments; and that the plaintiff gave to the defendant his bond in the penal sum of £400, with a condition

thereto annexed, that in case the defendant paid up all said notes punctually by the times therein specified, then if the plaintiff gave to the defendant a deed of said farm, said bond should be void, &c. That the defendant then immediately went into the possession of said farm, and that the defendant not having paid said notes, he chose to be off his bargain, and notified the plaintiff of it. The question arising upon this state of the case, is a very plain one to answer—a man agrees to purchase of another a farm of land upon credit, at a certain price, to be paid by sundry instalments, the seller to hold the land for security till it should be paid for; and the seller gives the purchaser a bond to convey to him the land when paid for, which reduces it to the principle of the cases which are very common, where the purchaser takes a deed and then conveys the land back to the seller for security, and takes a bond of him for a deed when he has paid for it. See the case of *Bacon w. Porter*, 1 vol. Root's reports, 370.

Parker vers. Smedly, and others.

An attested copy of the record of a deed is *prima facie* evidence of title, and is admitted in evidence where the original is not in the power of the party.

ACTION of ejectment for a tract of land, described in the declaration. Issue to the jury.

The plaintiff offered in evidence to substantiate his title, a deed from Jedidiah Strong, Esq. to himself of the land described, duly executed and recorded, a copy of a survey from the records of the proprietors of the town of Litchfield, to said Strong of said land, duly attested by the proprietors' clerk—also, copies from the records of said town, of deeds recorded, from sundry of the proprietors of said land to said Jedidiah Strong, duly attested. These copies of record were objected against by the defendant, who insisted that the original deeds, &c. ought to be produced as the best evidence the nature of the case would admit of.

By the court—The copies were admitted, as the best evidence in the power of the plaintiff to produce.

for the grantee, after having procured his deeds to be recorded, keeps them in his own possession, and the plaintiff has no means in his power to obtain them from him.

Welch *vers.* Gould and others.

ACTION of *trespals* for cutting and carrying away one hundred trees from the plaintiff's land.

An attachment subsequent to the date of a deed, not recorded at the time of the attachment—and the execution not levied until after the deed is recorded—the levy of the execution shall hold against the deed, if it was not recorded in a reasonable time.

The defendant plead not guilty. Issue to the jury.

The plaintiff's title was a deed from — Beard, dated the 30th of March A. D. 1785, acknowledged the same day before justice Everet, and recorded the 3d of April, A. D. 1788. This deed was denied by the defendants.

A question was made whether the plaintiff might prove the execution of the deed by comparison of the hand writing of the said Beard, and of the witnesses, one being in the state of New-York and the other in Vermont? By the court, he may not.—But the court admitted the signature of the justice, who took the acknowledgment, to be proved by comparison of hands—Upon which the deed was admitted, and said deed being recorded was allowed to go to the jury.

The defendants' title was an attachment laid upon the land as Beard's property, and service completed on the 14th of March A. D. 1787; and judgment recovered in March A. D. 1788—execution dated the 3d of April 1788, and the levy completed on the 7th of July A. D. 1788.

The question of law upon which this case principally turned was; whether, the plaintiff's deed, not being recorded in a reasonable time, nor till long after said attachment was laid upon the land, though before the levy of the execution was completed, should hold said land?

By the court—A deed, executed, acknowledged, and not recorded, by the statute, holds the lands

against the grantor and his heirs only. The creditors of the grantor have the same right to attach the lands for their debts, as if no deed had been given—and such attachment will hold the lands against the grantee. It is the recording of the deed only that operates to defeat the creditors and to divest them of their right of attaching the estate, as the grantor's. And there is no room for the doctrine of relation to apply in this case, for there is nothing to which the recording of a deed can relate, except it be to the entry made upon it, when it was received for record. The executing and acknowledging of a deed makes it operate to certain purposes, by the statute, and the recording of it makes it operate to divest the creditors of their right of attaching the estate, as the grantor's. Verdict and judgment was for the defendants.

By the statute of Henry VIII. deeds of bargain and sale must be enrolled within six months : By our statute no time is set, it must therefore be done in a reasonable time ; and this the court will judge of by the circumstances—and whether the record shall bear the same date, with the receipt of the deed, by the town-clerk, will depend upon, whether there was any fraud in the case, or whether the delay was through the fault of the register, or of the grantor or grantee. See the case of *Hartmyer vs. Gates*, tried at Hartford, March, 1774—1 vol. Root's Rep. p. 61, and *Ray vs. Bush* 81—and *McDonald vs. Leach*, Kirby's Rep. 72.

The Inhabitants of the Town of Litchfield *vers.* Wilmot.

Fifteen years uninterrupted possession of a highway will be a bar to the town's right of recovering it for the use of a highway.

ACTION of ejectment to recover possession of a certain piece of land, which was originally left by the proprietors for the use and purpose of a highway in said town.

Plea—not guilty. Issue to the jury.

The case was, in A. D. 1724, the proprietors laid out a part of a lot east of the demanded premises to



Daniel Culver, and bounded it west on land left for a highway. On the same day, they laid out the other part of said lot to said Culver, and described it as lying west of a twelve-rod highway, and bounded it east upon it. In A. D. 1725, Daniel Culver conveyed both parts of said lot, including said highway, to Edward Culver ; and by sundry mean conveyances, said lands came down to the present defendant. About thirty-six years ago, the land was cleared up and inclosed, and ever since had been possessed and improved by the defendant, and those under whom he claimed—That many years ago, a highway was wanted near this place and one was laid out by the county court, at the cost of the town of Litchfield, through private property, a few rods east of this land—And this had never been claimed, or any way improved for a highway, until of late years. Three questions were made—1st, Whether this land was ever properly laid out for a highway—2d, Whether the town, admitting it to have been regularly laid out, had right to this action to recover the possession?—and 3d, Whether the possession of the defendant, and of those he claimed under, the length of time aforesaid, had not vested a right in the defendant, and barred the plaintiffs of a right of recovery.

By the court—The proprietors, in laying out their original lots, leaving lands for a highway, and bounding their lots upon it, by the description of land, left for a highway, has ever been considered as tantamount to an actual survey of said highway. The fee in highways originally laid out or left as aforesaid, is in the original proprietor from whose lands they were taken. An interest in the use is vested in the towns in whose bounds they lie, as corporate bodies—because by law, they are obliged to provide, to keep and maintain in good repair all needful highways and bridges—and for any cost they are put to in removing nuisances, they have a right of action against the persons creating the nuisance. As individuals they have the same privileges of travelling in them as other

LITCHFIELD COUNTY.

citizens of the state ; and for any obstructions, unless there is a special damage, an information lies at the suit of the public.

By the statute for quieting of titles to lands, no one shall have an action to recover the possession of lands withheld from him, but within fifteen years next after his right or title of entry accrued.

The statute made to prevent encroachments on highways and on common land—is, that if any person, hath within the space of fifteen years, taken or shall take any part of any highway, or common, or undivided land into his field or inclosure, the select men or a committee appointed for that purpose, after giving warning to the person offending, are authorised to pull down and remove such fence or encroachments.

This remedy by pulling down and removing the encroachment, on common land as well as on highways, is limited to fifteen years, and was so adjudged in a cause tried at Windham near thirty years ago, between the town of Mansfield and Joseph Hovey—and the practice has ever since been correspondent to that decision ; nor have the towns supposed that they had any remedy, to recover possession of their highways after fifteen years had elapsed, any more than the proprietors, have for their common lands, if we may judge by their not commencing any suits of this nature. And the great quantities of lands left and laid out for highways in almost every town, which have been inclosed, built upon and are now enjoyed, without any molestation from the towns, notwithstanding, many of them greatly incommode the public, must be owing to the idea universally adopted that the right of the town to the use of land left for a highway, as well as the right of the proprietors to the fee, is barred, by the statute of limitation, by a fifteen years uninterrupted possession.

Verdict was for the defendant and judgment accordingly.

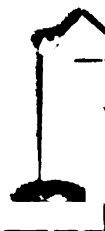
Thomas and Mary Taylor *vers.* Ebenezer Talman, administrator on the estate of John W. Gold.

APPEAL from probate. The case was, Talman took administration on the estate of John W. Gold, represented it insolvent, and had commissioners appointed. He exhibited an account to said commissioners against said Gold, amounting to £99, and supported it by his own oath, and had it allowed by the commissioners—said estate was insolvent and he received out of said estate £69-6, being his average.

A verdict and judgment thereon, is not to be presumed to be wrong—and an averment cannot be admitted against a record.

The said Thomas and Mary being dissatisfied with the doings of said Talman, said Mary being sister and heir to said Gold, commenced a suit against him in the name of the judge of probate, upon the administration bond, and the parties being at issue on sundry breaches in the condition of said bond, at the superior court, August 1794.

The jury found a verdict in favour of the plaintiff, as follows, viz. "In this case the jury find that at the decease of said J. W. Gold, he did not owe the said Ebenezer Talman, and that said Ebenezer did fraudulently exhibit a claim of a debt in his own favour, against said estate, of £99 lawful money, to the commissioners appointed to adjust the claims of the creditors; and did support the same by his own oath. They also find that said Talman has received sundry credits due to said deceased, and three thousand feet of white pine boards, and sundry articles of wearing apparel, particularly enumerated in said verdict, the effects of said deceased, of which said Talman has exhibited no inventory. Also they find that he has not made true returns of his proceedings in the sale of said real estate, which he had orders from the court of probate to do; and hath not kept and performed the condition of said bond; and find for the plaintiff to recover £139-15 lawful money, damages and cost."—That judgment was ordered thereon accordingly—which sum made



said estate solvent ; and the creditors had since received their respective balances in full, from Ephraim Kirby, Esq. who received the money recovered by said judgment, as attorney to the plaintiff—the remainder of said judgment he had paid to said Thomas and Mary, except £29-14, which the judge of probate ordered to be paid to said Ebenezer Talman, as the balance of said £99, he having before received £69-6, as his average. From this order said Thomas and Mary appealed.

To this the appellee, Talman, replied, that the jury who tried said cause included in their verdict the sum of £99 allowed as aforesaid by the commissioners, to the appellee, as part of the damages found by their verdict against the appellee, so that the whole sum allowed by the commissioners to the appellee had been recovered by legal judgment of court out of him, when he had received but £69-6, out of said estate.

The appellants demurred to the reply. And judgment—That the reply of the appellee was insufficient, and the order of the court of probate disaffirmed, upon two grounds—1st, It has been adjudged in the case of *Staniford w. Hide*, at Tolland ; and in the case of *Fairweather w. Curtis*, at Fairfield, and affirmed in the supreme court of errors ; that the heir has the same right to contest the claims of creditors allowed by commissioners, to administrators, at common law, as the administrator has to contest the claims of creditors allowed by commissioners ; and which the heir has no way of doing but by an appeal, or by an action on the administration bond, to recover out of the administrator's hands, what he has no right to hold and retain. And in both cases, where the claim allowed by commissioners is directly put in issue, as in this case, and the jury by their verdict find against the claim, the sum allowed by the commissioners is wholly set aside, and is no longer a ground upon which to retain the interest, or to make any future claim upon against the estate. And it is perfectly immaterial by what pretext the administrator attempts to cover over and hold the estate, whether it be by imposing upon the

commissioners as being a creditor when he has no just demand, or otherwise. The rule of damages is the interest he has embezzled, or has got into his hands which he hath no right to retain—and the order of the court of probate goes upon the ground that the jury made a mistake in assessing the damages, and that the verdict and judgment was wrong ; which is not admissible, nor is it competent for the court of probate to rectify what this court could not, only by a new trial. 2d, The verdict of a jury and the judgment of the court thereon, may not be impeached in this way ; nor are any averments admissible against them ; the party's remedy in such case is by writ of error against the judgment, or by a petition for a new trial, for a mistake of the jury in assessing damages. See the next case, *Taylor vs. Starr*—also, see *Staniford vs. Hide*, 1 vol. Root's reports, 263.

William Taylor vers. Ezra Starr.

SCIRE facias, declaring that before the superior court in A. D. 1793, he recovered a judgment against said Starr, upon a note dated the 29th of January, A. D. 1790, wherein he promised to pay to the plaintiff £436 lawful money, on demand, with the lawful interest ; on which was paid and endorsed the 15th of October, A. D. 1790, only the sum of 333 dollars and 1-3, and that the judgment was for no more than £391-17-6 by mistake ; when in fact he ought to have recovered the sum of £415-13-6, which was the sum due on said note ; the difference being £23-16 lawful money, and cited the defendant to shew reason why the court should not set said record right, or give judgment for said £23-16.

A mistake in entering up a judgment is to be corrected by a petition for a new trial, or by writ of error.

The defendant was defaulted—and the plaintiff moved for judgment ; but the court refused to render any judgment thereon, upon the principle, that where a verdict did not aid an insufficient declaration, a default would not. The averments in this declaration are directly opposed to the record of the judgment ; besides the things asked to be done are totally improp-

LITCHFIELD COUNTY,

er ; which are that the court would correct their own judgment after the term is ended, or to give a judgment directly contrary to their former judgment. The party's remedy is by petition for a new trial, or by writ of error.

Timothy Castle *vers.* Joseph Peirce.

In an action on the covenant of seisin, the court gave the consideration paid for the land, and the interest in damages.

ACTION for breach of covenant in a deed, declaring that the defendant for the consideration of £125 by deed dated the 13th of November 1783, bargained and sold to the plaintiff among other lands, two pieces of land, one containing twelve acres, and the other thirty-four acres, in Wilmington in the state of Vermont, and covenanted that he was well seised, &c. The breach assigned was, that the defendant was not well seised and that the plaintiff had been ejected from said lands.

The defendant plead in bar, a submission of said controversy to arbitration, on the 29th of September 1793; an award in the premises and a compliance with it—and that the notes given to abide the award were delivered up to each party.

The plaintiff replied, and admitted the submission and award, and the delivering up, to each party his note ; yet, that after said award, viz. in March A. D. 1794, both parties agreed to throw up said submission and award, and to abandon and disannul the same;—and did mutually agree to release each other from the same, and did in fact release each other therefrom—and entered into a new submission of the same matters, together with others, in the words following, viz. “ We the subscribers being dissatisfied with the award of Mitchel and Henman last September, do this day agree, that said Mitchel, Henman and Abijah Curtis, shall consider said matters of dispute in the former submission; and determine the same as shall be convenient—To hear and determine the dispute contained in said former submission.” That said arbitrators undertook the bur-

den of an award, but never made or published an award in the premises to the parties.

The defendant rejoined, that the plaintiff was uneasy, and threatened him with a law suit, unless he would submit the same matters again to said Mitchel, Henman and Curtis; and solely to satisfy the plaintiff, and save trouble, he did agree to said submission recited in the plaintiff's replication; yet that he never did agree with the plaintiff to abandon said award, or to disannul or set the same aside; nor did they mutually agree to release each other from said award; nor did they in fact ever release each other from the same; nor did they agree that either of them should be bound thereby in any manner, unless the same was implied by said written submission; and that said arbitrators took on them the burden of hearing and awarding in the premises; and the plaintiff in and by a certain writing under his hand, &c. in words following, viz. recites the revocation—revoked the power of said arbitrators.

The plaintiff demurred to the defendant's rejoinder; and judgment that the rejoinder was insufficient; upon the ground that the second submission implied and contained in it an agreement to set aside said first award, and a mutual releasing of each other absolutely from any obligation to abide said award. From this opinion of the court judges Root and Mitchel dissented, for the following reasons—the only question upon these pleadings, is, as the defendant in his rejoinder has denied all the averments in the plaintiff's reply, except the submission, whether the second submission to Curtis, &c. disannulled and set aside altogether the award made by Mitchel, &c. upon the first; and contains in it mutual release from and to each other, of all obligation to abide said award?

Thus it appears clear, that said second submission neither contains or implies any such thing; but only that the parties were both willing to take the judgment of the former arbitrators with said Curtis, upon the same matters; and had they made an award pur-

suant to said second submission, it would doubtless have been an extinguishment of the first, by force of the agreement. A submission to arbitration has never been considered as a disannulling any claim or barring any right, or as being a discharge of any obligation, award, or judgment. And as the plaintiff by his revoking the power of the arbitrators has prevented making an award, it is in effect suffering the plaintiff to take advantage of his own wrong; and his revoking the second submission destroyed all the effect it otherwise might have had. On a hearing in damages, the court adopted the following principles—for one piece of land which was under improvement, the rule of damages should be, the consideration paid for it, without interest—for the other piece of land not improved, the consideration paid for it, and the interest of the money.

Fuller *vers.* Burrel.

An averment in a reply against the express words of a discharge, bad upon a demurrer.

ACTION on note dated 29th of February, A. D. 1788, for £25-9 lawful money, payable on demand, with interest.

The defendant plead in bar, that before the date of the plaintiff's writ, he made full payment of the note on which, &c. and the plaintiff in and by a certain writing discharged him therefrom.

The plaintiff replied, prayed oyer of the writing and recited it as follows: "Received, Canaan, Oct-ber 7, 1790, of Jonathan Burrel £7-13-6 York "money in full of all demands." That said writing was given in discharge of a book account, for freight from Red Hook down the Hudson, to New-York, amounting to £7-13-6—stating the account, and for no other cause or consideration; and that said note was not in contemplation at the time of giving said discharge, the words, in full of all demands, were inserted by the defendant through mistake, and said note had never been paid or satisfied.



The defendant demurred to the plaintiff's reply; and judgment that the reply was insufficient. See the case of *Carter vs. Bellamy*, Kirby's Rep. 291, and *Casey vs. Casey*, at Windham last circuit.

Hamlin verf. Mitchel.

ACTION of account in common form, as bailiff and receiver, for £104-9-6, in state notes, received the 3d of October 1788.

Public securities pledged for a debt, cannot be called for, until the debt is paid.

The defendant prayed oyer of said receipt and recited it, as follows, viz. "Received October 3d 1788, of Nathaniel Hamlin, seven state certificates, amounting to £104-9-6, at ten shillings on the pound, York money, which are lodged with me as a security for £87 York money, which when paid, I promise to deliver to captain Hamlin."

And thereupon the defendant pleaded that the plaintiff's declaration and matters therein contained, were insufficient in the law—and especially assigned the causes of demurrer.

Judgment—That the declaration was insufficient—for by the receipt the securities were lodged as a pledge for £87, which did not appear to have ever been paid; and the securities cannot be called for till said debt is paid.

Banks verf. Mary Basset, administratrix of Samuel Basset.

APPEAL from probate. The case was, the appellant was a creditor to Samuel Basset; Mary Basset was administratrix on said Samuel's estate, which was represented insolvent, and commissioners appointed; and one Daniel Brown, previous to said Samuel's death, sued him on book, which suit was pending at the time of his death. Said Mary was cited to defend in said suit, and judgment was rendered.

An appeal from probate does not lie in favor of a creditor to an insolvent estate, because too much is allowed to another creditor by the commissioners.

ed in Brown's favour against her, by default, for £62-16-9 debt, &c. which he exhibited to the commissioners, with a further sum of £16-10-9 due by book, and had both allowed, when it was said nothing was due him, and which was a mistake, of which the commissioners were now sensible, and acknowledged they had done wrong in making the allowance. The question first to be determined was, whether one creditor could have an appeal in such case on account of another creditor's having a greater sum allowed him by the commissioners, than he was entitled to.

By the court—An appeal doth not lie for a creditor in such case, but only by an executor or administrator.

Benjamin Judd, &c. society's committee of the parish of Waterbury *vers.* Woodruff.

A deed to a society's committee and their successors, goes to the successors

—A deed received and entered upon "received for record," and thro the negligence of the register, not recorded until many years after, the record shall bear date at the time the deed was received for record.

A mortgagor and his alienee are tenants at will at the option of the mortgagee.

ACTION of ejectment for twelve acres of land which the plaintiffs held by deed from James Reynolds, dated the 26th of June, A. D. 1756.

Plea—no wrong or disseisin. Issue to the jury.

The plaintiffs' title was a mortgage deed from James Reynolds to the society's committee of Waterbury, and to their successors in said office, for the use of the ministry in the town of Waterbury.

The plaintiffs produced the records of the first society in Waterbury, of their having appointed annually a succession of committees down to the appointment of the plaintiffs. This record was objected to, because it was a record of the first society in Waterbury, and not of the society in the parish of Waterbury. The court admitted the record. The deed to the plaintiffs was delivered to the town-clerk, June 26th, A. D. 1766, and entered upon by him, as received for record 26th June, 1766, and was recorded at full length, in A. D. 1794.

The defendant's title was a deed from the same



James Reynolds, of the same lands, to Timothy and Isaac Jones, dated the 29th of May, 1771, and recorded the 13th of June, 1771, and a deed from them to the defendant, dated the 8th of June, 1772, and recorded immediately. The defendant went into possession in April, 1773, and paid the interest on the mortgage to the committee of the first society in Waterbury, about six years—and then refused, and said that the Jones's were to have settled it; but had not, and wished a suit might be bro't, but acknowledged the money to be justly due to the town.

The defendant contended—1st, That the society's records did not prove the present plaintiffs to be the successors of the original grantees—2d, That a society's committee were not a corporation, and could not take an estate in lands by succession—3d, That the defendant's title was perfected long before the plaintiffs', by having his deed recorded first—4th, That the possession of the defendant had been adverse to the plaintiffs' title for more than fifteen years next before the date of the plaintiffs' writ.

The plaintiffs contended that the society of the parish of Waterbury, and the first society in Waterbury, were synonymous.

By the court—Whether a society's committee be a corporation or not, is not material; so long as they are a legal body capable of taking estates by grant; and of being constituted trustees for public uses by the grantor. The plaintiffs deed was delivered to the town-clerk and by him entered upon the 26th of June 1766, and it was the duty of the town-clerk to have recorded it at length; and the plaintiffs are not to suffer for his neglect. But the record by force of the statute, bears date the 26th of June, 1766. See *McDonald v. Leach*, Kirby, 72—and *Franklin v. Cannon*, 1 vol. Root's Rep. 500.

The mortgagor is considered as tenant at will to the mortgagee, and his alienee also, at the option of the mortgagee. But in this case, the defendant by pay-

LITCHFIELD COUNTY,

ing the interest, acknowledged the plaintiffs' right, and himself holding under them.

The jury found a verdict for the plaintiffs, which was accepted by the court. Vide *Buckingham, &c. vs. Northrop*, 1 vol. Root's Reports, 53.

Canfield vers. Squire.

A book containing the statutes of another state, printed by a private printer, not admissible as evidence of the statutes.

A deed which is denied, not admitted in evidence to the jury without some evidence of its execution. Depositions admitted, to prove the loss of a deed, its execution and tenor.

ACTION upon the covenants in a deed, dated the 23d of August A. D. 1784, in and by which the defendant, for the consideration of £30, bargained and sold to the plaintiff a right of land in the town of Straton, and state of Vermont, which was originally granted by the governor of New-Hampshire to John Lyman, and warranted said right against all persons claiming from, by or under the defendant, or the said John Lyman. Breach assigned was, that the defendant had no such right; but that John Lyman was seised of said right, and in December 1789, said Lyman sold it to who had ever since held the plaintiff out therefrom.

The defendant plead not guilty. Issue to the jury, and verdict for the defendant.

In this case several points were resolved—1st, That a book, said to contain the statutes of Vermont, printed by Haswell, a private printer, may not be admitted as evidence of the statutes of Vermont—See *Bostwick vs. Bogardus*, ante.—2d, That a deed which appears to have been executed and acknowledged in the state of Vermont, may not be read, if denied, unless there is some proof of its execution—3d, That depositions are admissible to prove the loss of a deed by fire or otherwise—also to prove the existence, execution, and tenor of the deed.

Hart vers. Brown.

ACTION of trespass, brought before a justice, demanding forty shillings damages.

The defendant plead title to the land on which the trespass was done, and the cause was handed over to the county court, and by appeal came to this court. Issue to the jury—who found against the defendant's title, and for the plaintiff to recover fifteen shillings single damages; upon which the court gave judgment for forty five shillings, the treble damages, although the demand in the writ was for but forty shillings.

In an action of trespass brought before a justice, demanding 40s damages, and comes before the superior court on a plea of title, and the jury find for the plaintiff 15s single damages, the court will give judgment for treble that sum by force of the statute, altho' more than the demand in the writ.

White vers. Administrators of Samuel Judson.

ACTION on book for £80. Plea—That said Samuel Judson at the time of his death, owed nothing to the plaintiff by book. Issue to the court.

The plaintiff's book consisted of charges from the year 1770, to the year 1775 inclusive. Samuel Judson died in A. D. 1777—the plaintiff and said Samuel were neighbours, and both citizens of the state of New-York. The defendants relied upon the statute of limitations of the state of New-York, to bar the plaintiff of any recovery, and produced the law—and as the court were giving their opinion in the case, they observed how the issue was joined, viz. that said Samuel Judson, at the time of his death, owed the plaintiff nothing by book. Upon the evidence it appeared that said Samuel died in A. D. 1777, at which time the plaintiff's book was not out-lawed, and had never been paid. The court found the issue in favour of the plaintiff, viz. that said Samuel did owe, &c. at the time of his death, notwithstanding it appeared that the debt was barred by the statute of limitation at the time the suit was commenced.

On a plea to an action on book, that the deceased owed nothing at the time of his death—judgment will be for the plaintiff, if the deceased did owe, altho' the debt might have been barred by the statute of limitation, had the plea been proper.

Middlesex County, December Term, A. D. 1795.

Dorothy Smith *vers.* Ward.

Judgment arrested, because one of the jury had given his opinion in the case previous to the trial.

ACTION of ejectment—Verdict for the defendant.

A motion in arrest was made by the plaintiff that one of the jurors who tried said cause and consented to said verdict, had heard the facts and given his opinion in favor of the defendant, before he was returned and empaneled, and of which the plaintiff was ignorant ;—that the jurors who tried said cause, were inquired of, when the same was called, whether they had heard of said cause, or given any opinion thereon, and were informed that if they had, they would make it known, otherwise it would be taken that they had not ; and that said jurymen remained silent.

The defendant replied, that the facts alledged in said motion were not true. Elihu Stow, father of Joshua Stow, who carried on this suit, testified that before this suit was commenced, he heard said jurymen say, that it was not just Mrs. Smith should recover, for she had received a compensation. Obed Stow, brother of Joshua Stow, testified that about a year ago, he heard said jurymen declare, that it was not just or honorable that the plaintiff should recover, after she had received a compensation. The jurymen was admitted, and declared that he had no recollection of any such conversation with Elihu Stow, or with Obed Stow, the brother, but that he did tell Joshua Stow, when he informed him that Mrs. Smith was going to commence the action, that upon his representation, it was not just or honorable, she should recover against the defendant after she had received her pay ; and this he had wholly forgot. The court found the motion to be true, and arrested the judgment.

George and Anne Starr *vers.* Elihu Starr and George Phillips, executors of Philip Mortimer, Esq. deceased.

A PPEAL from the judgment of the court of probate, in proving and approving the last will and testament of said Mortimer, bearing date the 9th of July, 1792, and receiving and ordering to be kept on file certain other writings bearing date the 10th of March 1794, drawn up in the form of a will and codicil. The said George and Anne Starr moved that said judgment might be disaffirmed for the following reasons, viz. 1st, Because Timothy Starr, Elihu Starr and Joseph Sage, whose names were subscribed as the witnesses to the writing, bearing date the 9th of July A. D. 1792, and proved and approved by said court of probate, as the last will and testament of said deceased, were at the date aforesaid and ever since had been, and still are, inhabitants of said town of Middletown, and citizens of the city of Middletown, and as such were interested in the devises and bequests given by said will, to said city and town of Middletown, and were and are not legal witnesses to said will—2d, That said writing was drawn up by Elihu Starr in his hand writing, and that said Elihu Starr was by said will, appointed one of the executors; and also that said Philip Mortimer, Esq. deceased, had given to said Elihu Starr by said will, a legacy of £5 lawful money, and the service of a negro girl for about five years—3d, Because the writings aforesaid which were by said court of probate accepted as codicils, and ordered to be kept on file, were not witnessed by any person; and said writing dated the 10th of March A. D. 1794, was never subscribed, or published by said Philip Mortimer, Esq.—4th, Because Philip Mortimer, at the dates of the several writings aforesaid was not of sound disposing mind and memory.

A legatee cannot be a witness to a will.

A will cannot be proved in part—cannot be good as to the personal estate and void as to the real.

The appellee replied, that said writing bearing date the 10th of March 1794, was subscribed by said Philip on said 10th of March, when so much of said wri-

MIDDLESEX COUNTY,

ting was drawn as was contained in the six first pages, and to the thirtieth line of the seventh page. And that on the same day, said Philip directed the said Elihu Starr to compleat the said writing as it now was, and to conform the same to the first writing aforesaid, except where the last differed from the first; and for this he gave him parol directions. And that said Philip at the several dates aforesaid, was of sound disposing mind and memory; and as to the residue of the reasons the appellees said they were insufficient.

The appellants rejoined, that the residue of said reasons were sufficient, and that the reply respecting the writing, dated the 10th of March 1794, was insufficient.

The devises and bequests in the will were—that for the good will and respect the testator had for the city and citizens of Middletown, he gave and bequeathed to said citizens, a certain piece of land, adjoining east on the tomb lot; running four rods, &c. for a building spot, to erect a granary house; for the use of the inhabitants of said city; for which purpose he gave and bequeathed £600 lawful money, and directed out of what fund the money should be raised. He also gave and bequeathed to the inhabitants of the city of Middletown, as a stock forever, £400 lawful money, to purchase one thousand bushels of wheat, five hundred bushels of rye, and five hundred bushels of Indian corn; always to remain as a stock, to supply the necessities of those of the inhabitants of said city, who might stand in need; to be always under the management and inspection of the mayor and aldermen, for the time being; and directed out of what funds said £400 was to be raised. He then ordered the two sums to be raised and paid in preference to all other legacies. He then adopts Anne Starr, his niece, the wife of George Starr, as his daughter; and gave her the use of his house called Mortimer's Lodge, with a part of the land adjoining, during her natural life; and to her husband George Starr, during his natural life in case he survived her, with sundry specific legacies. He then gave sundry legacies to divers persons.



He then adopts Philip Mortimer Starr, son of George and Anne Starr, to be his son—and gave him all his other lands particularly enumerated and described in the will, and to his children lawfully begotten of his body, in tail male ; and in want of issue male, to his issue female ; under this further limitation, that said Philip M. Starr, should take the name of Mortimer, for himself and family, and have the same confirmed by the general assembly, to him and his heirs. Then his will was, that all the parcels of the real estate, together with the appurtenances before devised, to George and Anne Starr, for their lives, should revert to said Mortimer Starr, and his heirs, bearing the same name forever. He also gave to said P. Mortimer Starr, all his other estate of what kind soever, to him and his heirs.

And in case said Philip Mortimer Starr should not within one year after his coming of age, take the name of Mortimer; as aforesaid; and his niece Anna Starr, should leave no son surviving her, the estate given to said Philip, should go to her eldest daughter for her life ; and in case said eldest daughter should leave a son, and he take the fir-name of Mortimer, as aforesaid, then all the real estate given to the eldest daughter of his said niece for life, should remain to her eldest son and his heirs in tail male forever—and in case the daughter of his said niece should leave no son, or such son should not take the name of Mortimer, then the several parcels of real estate aforesaid, should continue to the next in succession, the males having the preference ; always observing, and it was his will, that any of that line, who might do and perform the injunctions and restrictions laid upon Philip M. Starr, which if they performed, should give them a right to his above said estate forever—and in failure of his niece's line of descent, his real estate should go to the first son of Peter Carnel, only brother of his said niece, on his complying with the injunctions ; then the real estate was given to him and his heirs in tail male, bearing his name ; but in failure of his comply-

ing with said injunctions, and taking the name of Mortimer, then to the son or grandson of James Mortimer, in Ireland, if any such there was, &c. And in failure of all these, he gave Mortimer Lodge, &c. to the Episcopalian church; and the rest and residue of his real estate to the town of Middletown, for the use and benefit of the poor inhabitants of said town, &c. and appointed George Starr, Elihu Starr, and George Phillips, his executors; to each of whom he gave £5, in token of his respect. The negro girl, the service of whom was given in the will to Elihu Starr, was made free by the after will or codicil—George Starr refused the trust of executor, and took the appeal.

The judgment of the court was—that said Philip Mortimer, the testator, at the dates aforesaid, was of sound disposing mind and memory. That the residue of the reasons for the appeal were sufficient; and that the reply of the appellees respecting the writing bearing date the 10th of March 1794, was insufficient.

The reasons of the court—1st, It is an established rule in this court, that whoever is interested in the event of the suit, or in the question on trial, is an incompetent witness, except in the case of members of a corporation, who from the smallness of their interest and the necessity of the case, are admitted. And it appears and seems to be admitted by the demurrer, that three of the subscribing witnesses are interested in the suit, as they are members both of said town and city; and no such necessity existed in this case, as said will was made years before the testator's death, and when in health; and other witnesses might have been obtained.

2d, That Elihu Starr, is further interested as a legatee, and is one of the executors who has accepted said trust, and is a party to this suit; he is therefore upon every principle an inadmissible witness. And although by some British authorities, executors and even legatees, who have released their legacy, and no party in the suit, have been admitted under certain circumstances (for there are adjudications both ways,)

yet such adjudications are incompatible with the laws of Connecticut; the simplicity of which excludes the possibility of introducing that speculative metaphysical refinement which so much embarrasses the British courts, without deranging our whole system. In England a will is proved in the prerogative court only, in relation to the personal estate, and has no effect upon the devises of real estate in the same will—but they must be proved in the common law courts in every trial for each, and a will for personal estate may be there proved without three witnesses—but the case is not so in Connecticut, for here the probate of the will extends to all the devises, as well as legacies, and all other courts are concluded by it; nor can a will proved in part, be good as to the personal estate and void as to the real, and no law will warrant such a decree—besides it would ordinarily be physically impossible. For suppose a man has a son and a daughter only, has a thousand pounds of real estate, and a thousand of personal; by will gives one half of his interest, viz. his real estate to his son, the other half, viz. his personal, to his daughter, and dies—the will has but two witnesses, it is therefore void as to the real estate. If the probate establish the will as to the personal estate in favor of the daughter, she will not only take the whole of the personal estate, but also will take half of the real estate, that being intestate—the daughter would have three quarters and the son only one, which would be unjust, and contrary to the design of the testator—and yet, by following the British labyrinth of learning, this would be the case. Further, witnesses interested in the question only, are there not excluded, but in Connecticut they are—so that according to the British practice witnesses may be admitted to prove a will as to one piece of land, although they hold other lands by the same will, and equally interested in the same question; but in Connecticut, such witnesses are wholly inadmissible.

3d, If there is no valid will, the codicils which are dependant on it must fall.

From the opinion of the court upon the first and

second exceptions to the will, Judge Root dissented. And previous to assigning the special reasons for dissenting from the court, it may be well to premise a few observations on the nature of wills and devises. A will or devise is a gift of one person to another to take effect at the death of the donor; and this power results from the idea of property; and this may be done by one, or by as many instruments as there are donees, or portions of property to be given. Powel on devises, 23, 24, &c. Each donee is interested in the gift to him, but not in those to others. A will may be good as to personal estate, and void as to real—it may be good as to some legacies and devises, and void as to others. No man can be a witness to attest a grant to himself.—A witness that can neither get nor lose any thing by his testimony, cannot be considered as incompetent on the score of interest.

By the Roman law, a will or testament was considered as a substitution, or appointment of an heir to succeed to the inheritance. The English borrowed many of their ideas respecting last wills from the Romans; and accordingly a devise of a man's real estate to his heir at law is void, and the heir takes by descent.

To rescue and restore the power of will making, from the long interruption and oppression of the feudal system, viz. from the Norman conquest, the statutes of the 32d and 34th of Hen. VIII. usually called the statutes of wills, were enacted, empowering every person (except, &c.) having manors, lands, &c. to give and devise them by will in writing or otherwise, by act executed in his life time, &c. These statutes not having prescribed the form in which it might be done, nor the solemnities with which it should be executed and attested; it was found, that for want of this, frauds were practised, wills surreptitiously obtained, were imposed on people, and lawful heirs were disinherited without and contrary to the will and mind of the testator; and that often by the mere parol testimony of those who were interested or not to be credited. To prevent and remedy this evil, it was

enacted by the 29th of Char. II. that all devises and bequests of lands and tenements, should be in writing, signed by the party, or some person in his presence, by his express direction, and attested by three credible witnesses, subscribing it in the presence of the testator, or it should be void. A will or devise executed according to the forms prescribed by this statute, must have been considered as a good will, duly and legally executed; whether the witnesses died, became interested, or infamous, before the time of their examination, in proof of it or not; for it could not be in the power of any man to preserve his witnesses;—it was enough that the will was executed as the statute required, to give it existence and perfection as a will. In the construction of this statute many doubts and difficulties arose, as to what was a signing by the testator, what a subscribing of the witnesses in the presence of the testator, what was meant by credible witnesses; whether they must be so, at the time of subscribing, or of proving the will, or both; or whether if they were not so at the time of subscribing, it would answer, if they were so at the time of their examination. See learned discussions on these questions in the case of *Hilier v. Jennings*, Carth. and 1st. of Lord Raymond, 505; and in the case of *Holdfast v. Dowling*, 2d Str. 1253. Also, in the case of *Windham v. Chetwynd*, 1st Burr. 414, in which last case Lord Mansfield has reduced the points in some degree to principles of common sense.

To avoid and obviate these doubts and difficulties relating to the attestation of wills and codicils of real estates in Great Britain, and in their colonies in America, by the 25th of George II. it is enacted, that any person who shall attest the execution of any will or codicil made after the 24th of June A. D. 1752, to whom any beneficial devise, legacy, &c. shall be thereby given or made, such devise, &c. shall so far only, as concerns such person attesting the execution of such will, &c. or any claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will, &c. within the



MIDDLESEX COUNTY,

statute of the 29th of Char. II. notwithstanding such devise. This statute seems to be an explanation of the 29th of Charles II. In England a will of personal property is proved before the spiritual courts. The several devisees of real property have each a distinct and separate interest in their respective devises, which every one must prove in a suit brought in the courts of common law. No legatee can be a witness to prove his own legacy—if it cannot be proved without him it is void—if it can he will be entitled to it. No devisee can be a witness to attest a devise to himself; his devise is therefore void unless it be otherwise attested according to the statute. The statute of George II. declares only, what was true before, viz. that such legacies and devises are void, and that such persons shall be considered as credible witnesses within the statute of Charles, and be admitted accordingly, as to all the other bequests in the will, as having no interest at all in them, or in any question respecting them. And it would be very unreasonable that because one or two of the bequests in a will should fail for want of proof, that the whole will should be void; and, it is nothing new for a witness to be interested in one point in a case, and not in another, and be admitted to testify accordingly. He may be interested respecting the bounds of land in a suit at law, but not in the title or the possession. A deed may be good for one purpose and void as to another—as a deed granting to A and B in severalty two distinct tracts of land, and A with another person are the only witnesses to the deed; the grant to A is void, for want of legal attestation, but good as to B, for in the grant to B, A has no interest.

The power of making a will is an important right, and held dear by society—the laws therefore respecting this right are to be construed favorably. By the law of this state, all persons of the age of twenty one years, of right understanding and memory, (and not otherwise legally incapable) shall have full power and authority, to make their wills and testaments, and all other lawful alienations of their lands or other estates. The power of making a will and other alienations of

property are placed on the same footing. The law relating to the attestation of wills and devises of land, is, that no will or testament wherein there shall be any devise or devises of real estate, shall be held good, and allowed for any such devise or devises, unless witnessed by three witnesses, all of them signing in the presence of the testator. This statute makes the attestation of three witnesses as aforesaid essential, only as to the devises of real estate. By another law of this state, all grants, bargains, and sales of lands, &c. shall be in writing, signed by the grantor, witnessed by two witnesses, and acknowledged, &c. or shall not be considered as completed according to law. Both these statutes, as well as the statute of Charles II. were designed to prevent any possibility of fraud and imposition, as to the identity of the instrument and the execution of it; and therefore have made these ceremonies of writing and signing, and attesting essential to the legal existence of the instrument.

The disability objected to the witnesses of the will in this case, is—first, on account of their being inhabitants of the town of Middletown. Now if the town of Middletown doth not, nor ever can take any beneficial interest by the will, the objection must fall to the ground. The interest given to the town, (if any) is a contingent remainder in a part of the testator's estate, upon the failure of certain conditions, performable by a succession of persons, either of whom performing, will defeat the estate. There is therefore not even a remote possibility of its ever vesting; for if the conditions are performed, the estate is defeated—if not, by the statute it becomes a fee simple in the issue of the first donee in tail—further the town is made only trustee for the use of the poor.

2dly; On account of their being citizens of the city of Middletown. The bequests to the citizens of said city are, first, of a plot of ground for a particular use, viz. for a building spot to erect a granary house upon, for the use of the inhabitants of said city. The use is after explained—for which purpose he gives £600 lawful money. He then gives £400 to

the inhabitants of said city to buy 1000 bushels of wheat, 500 of rye, and 500 do. of corn ; always to remain as a stock to supply the necessities of those who may stand in need ; and always to be under the inspection and management of the mayor and aldermen for the time being. This interest is given to the citizens of said city in trust for certain specified purposes ; viz. to build a granary house to store grain in for the use of the inhabitants, that is, to supply, by sale, such of the inhabitants as shall be under necessity and cannot purchase elsewhere ; and the citizens cannot apply these bequests to any other use. And it is to be under the superintendence and ordering of the mayor and aldermen—and the stock at all events to be kept good. There is therefore no certain beneficial interest that either the city or citizens at large have in these bequests ; but they are made trustees for the benefit of the needy inhabitants, who only have the privilege of purchasing grain there, and to pay for it at least what it cost, for the stock is to be kept good.

Further, should it be admitted that as inhabitants of the town, and citizens of said city, they are interested, it is a corporate interest only ; and members of corporations, as of towns, &c. have ever been admitted, as competent witnesses for their own towns, in all cases where from the nature and situation of the transaction it is not expectable, that other witnesses would be present, or be to be had. The case of *Elisha Smith, executor of D. Grant vs. E. Barber*, tried at Litchfield, August A.D. 1790, is in point. The action was *indebitatus assumpsit* for monies the defendant had received on certain notes belonging to the estate of said testator. Said Grant left a great estate ; he made the town of Torrington, in which he lived and died, residuary legatee. And these monies, it was agreed, if recovered, would increase the town's legacy. The inhabitants of the town of Torrington were offered as witnesses, and objected to ; and by the court, on solemn dispute, were admitted, and expressly on the ground of former decisions and precedents. All the people living about the testator for miles distant, were



inhabitants of the city or town or of both. The testator's making his will in time of health, doth not alter the principle the law goes upon in such cases. Was ever a deed, made to the state, or to a town, and witnessed, the first by citizens of the state, the second by the inhabitants of the town, adjudged void for want of legal attestation, or even questioned—I think not. The case of a will is more to be favored.

The second objection goes to Elihu Starr only.—That he wrote the will, was one of the executors, and had a legacy. The first requires no answer, nor indeed the second—an executor is but a trustee and as such, has no interest; and at the time of subscribing, it is uncertain whether he ever will have; if afterwards he becomes interested by being made a party to suits, this may exclude him from giving testimony in those suits; but cannot effect the execution of the will. Besides, if he cannot attest his own appointment, and it cannot be done without him, the appointment is void—but this will not effect the devise in the will, nor prevent his being a good witness to attest the will as to them. As to the third objection, that he had a legacy by the will—this is an interest, and if the will can be proved as to the personal estate without him, he will be entitled to his legacy, and then he can have no interest in testifying to the will as it respects the devises of real property. If the will cannot be proved without him, then his legacy is void; and his own testimony cannot help it. In either case, he has no interest, for he can neither get or lose any thing by his testimony.

Again, if notwithstanding, the witnesses should be considered as interested and incompetent, they must be so only in respect to the bequests to said town and city; and to said Elihu—As to every other part of the will; they are competent witnesses, and have no interest. And must the whole will fail, because these bequests are void? The interest given to them will go to the heir, or fall into the residuum: No injustice will be done, nor will the will of the testator be contravened;

except in the failure of those bequests. If those bequests are void for want of proper attestation, then the witnesses, as to every other part of the will, are equally disinterested, as though no such bequests had been attempted to be given them. In the courts of law a man recovers according to the right he substantiates. In courts of probate, where the several legatees and devisees have several and distinct interests, under one and the same instrument, the will, it ought to be approved as far as it can be proved and established, according to the forms of law, in favor of every legatee or devisee ; only where this would work manifest injustice and violate the obvious intention of the testator. That a will must be wholly void, because that some of the bequests cannot have effect, appears to be a great absurdity ; and contrary to constant practice. How frequent are legacies lapsed by the death of the legatee in the life of the testator ; and rendered void for uncertainty, both as to the thing given, and of the person to whom given. Also by reason that the testator did not own the thing given. Yet no one ever thought these failings made void the will—or if a devise or legacy fails for want of due attestation, it cannot affect those which are well attested. If we resort to principles, I think we shall do what the courts in Great Britain are practising under the sanction of the 25th of Geo. II. and which might as well have been done, without the act, as with it. That is, to consider a legacy or devise given to a witness, by a will which is attested by himself, to be void—and the witness competent to the attestation of the will, as to all other bequests.

In the case of a man's dying and leaving a son and a daughter, and £1000 in real and £1000 in personal property ; and a will of all his real estate to the son, and of the personal to the daughter—witnessed only by two witnesses.—The will would be void as to the real estate, and good as to the personal property in point of attestation. I should suppose that it ought to be established, as to the personal estate, and what is given by it, considered as a portion advanced to the

daughter by an act done in the life of the testator, and the whole real estate be set out to the son. This would fulfil both the law and the intent of the testator, and would be equitable and just. But to set aside the will, would directly counteract the will of the testator, which was that the son should have the real, and his daughter the personal estate.

This is going upon the principle that every devisee and legatee is not interested in establishing the will, any farther than it respects his or their own devise or legacy. And if such devise cannot be established, without this testimony, it must fail; but as to the will, as it respects every other devise or legacy—to any other person, he is wholly disinterested.

N. Scovel *vers.* Chapman and Wadsworth.

ACTION of the case, declaring that the defendants and one Barnabas Dean, deceased, on the 27th of November A. D. 1794, were owners of the schooner Dove, lying in Connecticut river, at Pratt's ferry in Wethersfield, of which said Chapman was master; which schooner was kept for the purpose of coasting up and down said river, and for transporting goods, &c. from said Wethersfield to Hartford. That on or about said 27th day of November A. D. 1794, the plaintiff delivered to the defendants on board said schooner, nine hundred bushels of salt, of the price of six shillings per bushel; and the defendants by their said master received said salt on board said schooner, in good order, to transport the same from said Wethersfield to said Hartford, for customary freight; which the plaintiff agreed and promised to pay the defendants; and the defendants in consideration thereof assumed and promised to transport said salt from said Wethersfield to Hartford safely, and to deliver the same to the plaintiff there, in good order, &c. That said schooner at the time of receiving the plaintiff's said salt on board, was not sea worthy, but was rotten, decayed and defective in her planks, so that she admitted the water into her hold upon said salt, whereby the whole was dissolved and entirely lost.

Owners of
coasting vessels,
responsible for
the sufficiency
of their vessels.

The defendants plead not guilty, and put themselves on the country.

It appeared upon the evidence, that the planks of the schooner were rotten the inside, and a mere shell on the out side, found in some places a quarter, in some half, and in some not more than one eighth of an inch. The ice running in the river, cut through and let in the water upon the salt. Verdict for the plaintiff to recover, and accepted by the court.

The defendants moved in arrest of judgment the insufficiency of the declaration.

The court found that the plaintiff's declaration was sufficient, and gave judgment for the plaintiff to recover.

Paddock *vers.* Cornelius Higgins, Esq.

Guardian liable on the covenants in an indenture of apprenticeship.

Oyer not to be given on an instrument alleged in the declaration to be lost.

ACTION for a breach of covenant in a certain indenture of apprenticeship—declaring, that the defendant in and by a certain written indenture, dated the day of April A. D. 1789, as guardian to David Smith, a minor, did place and bind him to the plaintiff, by indenture, signed by the plaintiff and defendant, and said David, an apprentice to learn the trade of a shoemaker and tanner, &c. faithfully to serve the plaintiff until he should arrive to the age of twenty one years, which would be in May A. D. 1795—and in consideration thereof, the plaintiff agreed and covenanted to instruct said David in the art or trade of a shoemaker and tanner, &c. that said David entered into the plaintiff's service in April A. D. 1789, and continued in his service until the month of March A. D. 1793, when the said David in violation of his said indenture, went off, and left the plaintiff's service, and had never since returned; that the plaintiff had performed on his part the covenants in said indenture, whereby the plaintiff was damnified £60, and alledging that a duplicate of said indentures was made and executed, and one delivered to the plaintiff, which by some inevitable accident was lost,

in a manner wholly inexplicable to him, and that the other part was in the hands of the defendant.

The defendant plead in abatement—1st, That no profert was made of said indenture—2d, That said David who signed said indenture with the defendant, was not made a party in the suit—3d, That the plaintiff's remedy was upon the statute against the apprentice only,

The court judged the plea in abatement to be insufficient, and the cause was continued—when the defendant prayed oyer of said indenture.

The plaintiff replied, that the motion for oyer was insufficient, for the reasons assigned in the declaration ; and the judgment of the court was, that the motion was insufficient.

Azariah Whittlesey *vers.* *Richard Dickerson.*

PETITION for a new trial, in an action of defamation, brought by said Dickerson against said Whittlesey, for speaking the following words, viz. "Richard Dickerson has forged a certain note, and I can prove it"—alleging several grounds for a new trial, as new evidence to encounter the testimony of said Dickerson's witnesses. Also that one of the jury who tried said cause had heard so much of it previous to the trial, as to have prejudged it.

Where a petition for new trial assigns sundry reasons, some sufficient, some not—on plea, the court will abate it as to the insufficient parts.

The respondent plead in abatement of the petition, that it contained no sufficient reasons for granting a new trial.

The court ruled the plea in abatement to be sufficient as to all the reasons alleged in said petition, except two, which were specially excepted, and as to those the court enquired of the evidences.

Lay *vers.* *Hayden, &c.*

ACTION against the defendants for obstructing a certain highway, leading to the plaintiff's

Proprietors admitted to testify respecting

the title to lands
which they had
quit claimed
for valuable
consideration.

wharf and fishery, in Saybrook to the Point, by erecting a wharf upon it.

Plea—Not guilty. Issue to the jury.

The defendants justified under a quit-claim deed from the proprietors' committee, of all their right to a certain situation or place on Connecticut river, at the Point, upon which they built a wharf; and offered the proprietors as witnesses to prove their right.

The plaintiff objected against their being admitted on the score of their interest; for that although the deed was a quit-claim, yet it being given for a valuable consideration, if the defendants failed to hold the title, the defendants would be entitled to recover back the consideration paid for it.

By the court—The interest must appear to be certain, in order to exclude a witness, the interest in this case appears to be very uncertain and dubious—and the proprietors were admitted.

New-Haven County, Jan. Term, A. D. 1796.

Jehu Brainard, Esq. *vers.* William Fowler and Dow Smith.

An action of debt on bond in the name of Jehu Brainard, without the addition of sheriff, is supported by a bond given to Jehu Brainard, sheriff.

WRIT of error to reverse a judgment of the county court, in an action brought by Brainard *vs.* Fowler and Smith—which was as follows, viz.
 “Summon William Fowler and Dow Smith to appear before, &c. to answer unto Jehu Brainard, Esq. of New-Haven, &c. in an action or plea of debt, that to the plaintiff the defendants render the sum of £20, which they owe and unjustly detain; for that the defendants in and by a certain bond, dated 29th day of June, A. D. 1795, acknowledged themselves holden and bound unto the plaintiff, his heirs and executors, in the sum of £20, to which pay-

"ment the defendants bound themselves jointly and
"severally," &c.

The defendants prayed oyer of said bond, which was in the words following, viz. "Know all men, &c. that we William Fowler of, &c. and Dow Smith of, &c. are holden and firmly bound unto Jehu Brainard, Esq. of, &c. sheriff of said New-Haven county, in the penal sum of £20, &c. to be paid to him, his heirs, executors, &c. to which payment we jointly and severally bind ourselves, heirs, executors, &c. Signed, &c. this 29th day of June, A. D. 1795."

To which bond there was a condition annexed in the words following, viz. "The condition of this obligation is such, that whereas said William Fowler is confined in New-Haven county gaol, on an execution in favor of Osborn Stone; for the sum of £5-15-1, issued on a judgment rendered by justice Chittington, on the 28th of April, A. D. 1795. Now if the said Fowler shall abide a true and faithful prisoner within the limits of said prison, and not depart therefrom, until lawfully released, and shall indemnify and save harmless said Brainard, from all losses, trouble, &c. on account of his having the liberties of said prison, then said bond to be void"—and thereupon the defendants said that the plaintiffs' declaration, and matters therein contained, were insufficient in the law.

The plaintiff replied, that his declaration was sufficient and judgment of the county court that the plaintiffs' declaration was insufficient and for the defendants to recover their cost. Error assigned was, that said county court ought to have adjudged said declaration sufficient.

Plea—nothing erroneous. Judgment—manifest error.

By the court—It has long since been settled that it is not necessary to set forth the condition of the bond in the declaration. The action is brought in the name of

Jehu Brainard, without describing him to be sheriff—the declaration counts upon a bond given to Jehu Brainard. The bond produced on oyer, appears to be a bond given to Jehu Brainard, sheriff of the county of New-Haven. This if any thing is a variance between the declaration and the bond; and if the defendants could have availed themselves of it, they must have plead the variance in abatement. The declaration shews a debt to be due to the plaintiff from the defendants by bond. The bond produced on oyer evinces the same thing; whether it be in virtue of his office as sheriff, judge of probate, or treasurer, &c. still it is a debt to Jehu Brainard. He is the person to whom the defendants are indebted, although it be in right or virtue of his office as sheriff. The bond produced on oyer is recited and thrown upon the record and is the same as if it had been recited in the declaration.

John Fields *vers.* William Law.

A recovery in an action of trespass, is a bar to an action brought for a trespass committed prior to the first writ.

No action lies in favor of a guardian to recover damages for taking away his ward, without alledging the loss of service.

A mother is the natural guardian of her female children, the father being dead, until they arrive to the age of discretion for choosing a guardian.

WRIT of error to reverse a judgment of justice Peck, in an action brought by said Law *vs.* said Fields, declaring that he was, and for more than two months had been, guardian to Dema Clark, daughter of Josiah Clark, deceased, and under the age of twelve years—duly and legally appointed by the court of probate, and the plaintiff being so as aforesaid guardian of the person and estate of the said Dema, the defendant on or about the 23d of October last, did take the said Dema out of the custody and keeping of the plaintiff, and did elope and carry her away, and ever since had kept and detained her from the plaintiff; whereby he was and had been prevented doing his duty as guardian aforesaid to said Dema. Writ dated November 23d, 1795.

Plea in abatement—that the defendant having prayed oyer of the record of the plaintiffs' appointment to be guardian was as follows, and recited it, by which it appeared that no person gave bond, but the plaintiff; and thereupon that said writ ought to abate, be-

cause the plaintiff had not been legally appointed guardian for want of good and sufficient security being given; which plea was demurred to—and judgment, that the plea was insufficient.

The defendant then plead in bar, that the said Dema was the child of the wife of the defendant, by her former husband, Josiah Clark, and that the plaintiff by writ dated the 26th of October, A. D. 1795, instituted an action against him, before said justice Peck to be answered on the 11th of November then next, therein alledging that he was guardian to the said Dema, and complaining that the defendant on the 22d of said October, did without law and right, take the said Dema out of the custody of the plaintiff, and her ever since had detained from the plaintiff, to his damage forty shillings; to which action the defendant plead not guilty—and said justice found the defendant guilty, and gave judgment for the plaintiff to recover £1-15 damages and cost; and that the taking and carrying away of said Dema mentioned in said record and judgment, was the same taking and carrying away which was alledged in the plaintiff's declaration, and not diverse therefrom; and this action was for the same cause matter and thing.

The plaintiff replied, that the defendant on said 23d day of October, did eloin and carry away said Dema from the custody and keeping of the plaintiff, and from said 23d of October to the date of the plaintiff's writ, held and kept the said Dema; as stated in the plaintiff's declaration.

To this reply the defendant demurred; and the plaintiff joined in the demurrer—and the justice gave judgment that the plaintiff's reply was sufficient, and for the plaintiff to recover £2 lawful money damages and cost.

Errors assigned were—1st, That said justice ought to have adjudged said plea in abatement sufficient—2d, That he ought to have adjudged the plaintiff's replication insufficient. Wherefore and for other errors

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NEW-HAVEN COUNTY,

apparent in the record, the said John Fields prayed said erroneous judgment might be reversed.

Plea—nothing erroneous.

The first point was, whether the law which says, that the judge of probate, upon appointing a guardian, shall take good and sufficient security, meant that it should be a bond with surety. Had there been no practice upon this statute to the contrary, the court seemed inclined to give it that construction; and how the general practice had been, did not clearly appear, and the court made no decision upon this point.

The plaintiff in error stated the following reasons why the judgment was erroneous.—1st, That no action would lie in favor of a guardian for taking away his ward, without alledging a loss of service—2d, That the mother was the natural guardian of all her female children if the father was dead, until they arrived to the age of discretion for chusing a guardian for themselves; and that no guardian which the court of probate should appoint, had right to take them from the mother or to have an action against her for detaining them—3d, That the plaintiff in the former action had recovered for taking away said ward by force and arms, on the 22d of said October, and for detaining her up to the 26th, the date of said former writ;—and this action was for taking her away on or about the 23d of the same October, and detaining her up to the 23d of said November, the date of the last writ. It appearing that the taking away charged in the present action, was the same for which the plaintiff recovered in the former action, and being expressly averred in the plea to be the same and not diverse, and was admitted by not being traversed. In trespass the taking being the gist of the action, and the detention only in aggravation of damages, the judgment ought to have been that the reply was insufficient.

Judgment—Manifest error.



By the court.—The former process is dated the 26th of October, and the taking away of said Dema is laid to have been on the 22d of same October, and that the defendant continued to detain and keep her until the date of said action. Every act of taking and detaining of said Dema previous to the date of his action was, or might have been given in evidence in that action, and damages recovered. Every cause of action for taking and detaining the said Dema previous to the 26th of October is barred by that judgment; otherwise it would be in the power of a party to split up trespasses and multiply actions for every distinct act, to the great vexation of mankind. This action charges the defendant with taking away of said Dema on the 23d of said October, which is the gist of the action; the detention is only to enhance the damages, of consequence the plaintiff has no right to maintain this action.

As to the point, whether a guardian may have an action to recover damages for taking away his ward, without alledging a loss of service—the court were of opinion that he could not, but that application should be made for a habeas corpus, to take the ward and bring her before the court, and to cite the party to shew cause, and unless sufficient reasons were shewn to the contrary, the court would order a restitution of the ward with cost.

As to the other point, the court were of opinion, that the mother, upon the decease of the father, was the natural guardian of her female children, until they should arrive to the age of discretion for chusing a guardian, and that they may not be taken from her, except in cases of disability in the mother to take care of them, or other circumstances which may make it necessary to prevent their suffering in their persons, estates, or education.

Wilford vers. Jones.

Execution must be taken out against the principal and a demand on the garnishee, within sixty days from the court in which judgment is rendered.

SCIRE FACIAS, declaring that said Wilford commenced an action against S. Barker, an absent absconding debtor, by writ dated the 1st of May A. D. 1790, returnable to the county court, on the 3d Tuesday of March A. D. 1790; demanding £231-19-7, and caused a copy to be left with said Jones, as agent, factor, trustee, and debtor to said Barker; and that on the 4th Tuesday of November A. D. 1790, he recovered judgment against said Barker in said suit, for £231-19-7 lawful money damage, and forty two shillings and seven pence cost. That he took out execution on said judgment, dated the 20th day of June A. D. 1793, and delivered it to a constable, who on the same day made demand of the monies due on said execution of said Jones, which he refused to pay, and said execution was afterwards returned non est inventus. That said judgment and execution remained in full force unpaid; and said Jones is, and was, when said copy was left, attorney, factor and debtor, to said Barker, praying for remedy in the premises. Writ dated January 10, 1794.

In this case there were special pleadings, which terminated in an issue to the jury—who found a verdict for the plaintiff.

The defendant after verdict moved for judgment, because no execution had been taken out nor demand made upon him, within sixty days after judgment, nor within a reasonable time after. The court gave judgment that the motion of the defendant was sufficient, and for him to recover his cost—see the case of William Laight *vs.* Isaac Tomlinson, ante. adjudged in the supreme court of errors.

Munson vers. Hills.

If a debtor in execution escapes from the officer with his consent, the cre-

SCIRE FACIAS brought to the county court—shewing, that he recovered a judgment against said Hills, before said county court, on the third Tuesday of March 1792, for £20 debt, and 23/7 cost,

and had execution therefor ; dated the 27th of February A. D. 1793 ; that he delivered it to Isaac Benham, a constable, who for want of estate levied it on the body of said Hills, that said Hills by misrepresentation and fraud effected his escape from said constable, whereby the plaintiff was prevented from again levying said execution, or enforcing said judgment, without the act of the court—praying that judgment might be rendered against said Hills, for the aforesaid sums, and for the cost of this suit.

ditor may have an alias execution to retake the debtor.

The defendant demurred to the declaration.—Judgment—That the declaration was insufficient.

By the court—If the escape from the officer was tortious or negligent, he may retake the debtor ; if it was with his consent, he cannot retake him—but this will be no bar to the creditor's retaking him, or having an alias execution on the same judgment ; for the creditor is not obliged in such case to accept the officer for his debtor. But if the debtor's estate had been taken, or the money levied by the officer, the case would have been otherwise—for the debtor having been compelled to pay the debt, or turn out estate to the creditor's officer, he is discharged, if the estate is sufficient to pay the execution.

Abraham Bradly, &c. *vers.* Timothy Phelps.

ACTION of the case, declaring that on the 11th of July A. D. 1793, Elijah Austin, late of New-Haven deceased, applied to the plaintiffs and requested the loan of £590 lawful money for the term of three months, which they declined without an endorser ; upon which he proposed the defendant to become his endorser ; to which they agreed, and, on the 11th day of July aforesaid, they loaned said sum to the said Elijah, and took his note of that date, for said sum, payable to them, in three months from the date with the lawful interest. And the defendant, to induce the plaintiffs to loan said sum to the said Elijah, and to take his note for the same, made and executed on the

A person not party to the note, signing his name blank on the back of it, imports a warranty that it should be recoverable when due. The promisee suffering the note to lie after it becomes due, will exonerate the endorser.

NEW-HAVEN COUNTY,

back of said note, of the same date with said note, a writing, wherein and whereby, the defendant at New-Haven on the day and year aforesaid, in consideration that the plaintiffs would accept said Elijah's note for said sum, assumed and promised the plaintiffs that he would pay the amount of said note when due, according to the tenor thereof, in case the said Elijah did not pay it—That said Elijah had never paid said note, that he failed in his circumstances, and died in June A. D. 1794, a bankrupt. Of all which they gave the defendant notice on the day of October A. D. 1794, yet the defendant refused to pay said note ; nor had the same ever been paid.

The defendant plead that he did not assume and promise in manner and form, &c. Issue to the jury.

The state of the case upon the evidence, was this ; Elijah Austin at the date of the note, applied to the plaintiffs for said loan, which they declined, without an endorser, upon which the defendant was proposed and agreed to by the plaintiffs as an endorser. Austin wrote and executed the note to the plaintiffs, and carried it to the defendant, and immediately returned to the plaintiffs' shop, with the defendant's name endorsed blank on the back of it. The plaintiffs accepted the note and paid the money to said Austin. The three months elapsed, and the note lay. Said Austin was doing business and in good credit, at the bank in New-York and elsewhere ; and between the month of October and his death, he paid a great many thousand dollars, to various persons ; and in February A. D. 1794, the plaintiffs received the interest of him and endorsed it on said note. Nor did it appear that the plaintiffs, after said note became due, took any measure, to recover the money of said Austin. And the note lay in the plaintiffs' hands, with the defendant's name endorsed blank upon it, until after said Austin's death ; and then it was filled up with the promise over the defendant's name on the back of said note.

The defendant objected against the endorsement, written over his name, under the circumstances, being allowed to go to the jury as evidence. By the court it was allowed to go to the jury, with this observation, that it could be evidence of nothing more, than the transaction itself would import, without it.

The jury found a verdict in favor of the plaintiffs, from which the court dissented, and returned them to a second consideration, for the following reasons:— In ordinary cases the endorser of a note undertakes that the money shall be obtained from the promisor, when it falls due, by the endorsee; his using due diligence, and taking the remedies which the law has provided; but if the endorsee neglects to call on the promisor for the money when it becomes due; and suffers it to lie without taking any legal steps to secure or recover it, the endorser will be exonerated, in case of a loss; unless the promisor was absolutely a bankrupt, when the note fell due. *Douglas 496, Ruffel vs. Longstaff.*

This note was not given to the defendant and by him endorsed to the plaintiffs in the usual mode of doing business; but it was given to the plaintiffs with the defendant's name endorsed blank on the back of it. Now it is clear, that the plaintiffs and the defendant understood this to be a guarantee of the note—and the only question is how extensive the guarantee was? Whether it was an engagement on the part of the defendant that the note should be paid at all events; or an engagement that the plaintiffs should suffer no loss by loaning that sum of money to said Austin, and taking his note for it, payable in three months, with the interest; or in other words, that the plaintiffs should be able to obtain the money of said Austin at the expiration of three months; the latter is most unquestionably the sound construction of the transaction; and what the parties themselves understood it to be in the time of it. The case then is a very clear one in favor of the defendant, for when this note became due, Austin was abundantly able to pay it; was doing business largely, and in good credit long after, and paid

*Ms. The case
cited from
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many large sums of money—the plaintiffs therefore by suffering the note to lay after the expiration of the three months, gave him a new credit, and trusted him on his own account, for which the defendant is no way answerable ; for he was his sponser for the three months only, and any expressions in the endorsement otherwise cannot alter the case.

Judges Sturges and Huntington assented to the verdict, upon the ground that the transaction imported an undertaking on the part of the defendant to pay the note at all events, in case said Austin did not. The jury returned to a second consideration, and found a verdict in favor of the defendant, which was accepted by the court.

Fairfield County, January Term, A. D. 1796.

Ephraim Wheeler, jun. *vers.* Isaac Gorham.

An estate for life is to be appraised off on execution as real property—and so much only, as including the life of the debtor, will be sufficient to satisfy the execution.

ACTION of ejectment, for eight acres of land, described in the declaration, which the plaintiff claimed as tenant by the curtesy in right of his late wife Abigail, deceased, of which in A. D. 1782 he was well seised, and of which afterwards in A. D. 1784 he was disseised by the defendant.

The defendant plead that he had done the plaintiff no wrong or disseisin. Issue to the jury.

The plaintiff's title was in right of his deceased wife, as tenant by the curtesy—this was not questioned.

The defendant claimed under the levy of an execution in favour of a Mr. — Bartlet, for £10, against the plaintiff, dated the 8th of March A. D. 1782, which was delivered to John Bayanton, a constable, who levied the same on this piece of land, and advertised it upon the sign post to be leased or sold at the

end of twenty days, to the highest bidder; and said land was sold to Joseph Banks, for him to hold and improve for the term of twelve years, three months, and three weeks, he being the highest bidder. And said constable made a lease of said piece of land to said Banks, for the term aforesaid, dated the 18th of March A. D. 1782, which was recorded in February A. D. 1784; and the defendant derived his title from said Banks.

The plaintiff produced evidence, and shewed that the annual improvements of this piece of land were worth £4-10 lawful money.

Two questions arose in this case—first, whether an estate for life, taken by execution, may be sold at the post as a chattel, or must be appraised off to the creditor as real property?—2dly, whether the whole of such an estate is to be disposed of for a sufficient number of years to pay the debt, or only such part as will be sufficient to pay the debt during the life of the debtor?

The jury found a verdict for the plaintiff, which was accepted by the court, upon the principle that all freehold estates, as an estate for life is, ought to be appraised off upon execution, as land or real property—and that such part only ought to be taken, as including the debtor's whole interest or life in it, will be sufficient to pay the debt.

James Clark *vers.* Benjamin Bull, executor of John Harpin.

ACTION of debt on book. The defendant plead the statute of limitation in bar of all the articles charged in the plaintiff's book, except the three last; and as to the three last the defendant plead, that before the date and impetration of the plaintiff's writ, he made full payment for them to the plaintiff, and put himself on the court.

A mortgage of personal estate given to secure a debt by book, is a security given for it, which takes it out of the statute of limitation.

This judgment was reversed by the supreme court of errors.

The plaintiff replied to the defendant's plea in bar, to all the articles on book, except the three last.—That on the 20th of December A. D. 1771, said John Harpin was indebted to the plaintiff £43-8-9, lawful money, for said articles charged in the plaintiff's book, previous to that time; and to secure the payment thereof, the said John did on said 20th of December A. D. 1771, make, execute and deliver to the plaintiff, a certain deed or instrument as follows, viz. "Know all men by these presents, that whereas "Doctor James Clark, of Milford, &c. has made me "several advancements in money and goods to a considerable amount, for which I stand justly indebted "to him, particularly towards the making and manufacturing potashes, &c. and doth still, and agrees "to continue advancing and assisting me in carrying "on said business. Now know ye, that for the "consideration thereof, I John Harpin, of Milford, " &c. do hereby for myself, my heirs, executors, &c. "sell, make over, and confirm unto the said James "Clark, his heirs, &c. my potash house in Milford aforesaid, near my present dwelling house, with the "kettles, coolers, and all the utensils and appurtenances thereto belonging, and appertaining, with "all the privileges, &c. as also the ashes I have collected and in store, or may collect for that purpose: "as also one yoke of oxen, the same I lately bought "of John Stone, and have now in use; also one "black mare, coming five years old; one cow, the "youngest I have, which I bought of Benjamin Burn, "when a calf; also one silver tankard, marked M. H. "weight twenty eight ounces avoirdupois, more or less—to have and to hold, to him the said James "Clark, his heirs, &c. to his and their own use, benefit and behoof, forever—Provided nevertheless, and "and it is the true intent and meaning of the parties, "that if the said Harpin, his heirs, executors, &c. "shall well and truly pay the said Clark, his heirs, executors or administrators, all his just dues and debts, "then the foregoing instrument to be null and void; "otherwise to stand in full force and virtue in the law. "Signed John Harpin, and seal." And that all the

articles charged on the plaintiff's book, before the 20th of December A. D. 1771, and all said other articles charged since said 20th of December, were secured, by specialty given for them as aforesaid by said Harpin; and traversed the defendant having made full payment of said last three articles, and likewise put himself on the court.

The defendant demurred to the plaintiff's reply to his plea in bar of all the articles charged on book, except the three last. The plaintiff joined in the demurrer.

The court heard the evidence upon the issue, of full payment of said three last articles, and found that the defendant had not made full payment of said three last articles charged, as the defendant in his plea had alledged.

The court also heard the parties upon the demurrer and gave judgment that the plaintiff's reply was sufficient and for him to recover £60 lawful money.

By the court—The facts which are disclosed and admitted in these pleadings are, that in December 1771, said Harpin was indebted by book to the plaintiff for money and goods £43-8-9, and to secure the payment of that sum and any further advancements the plaintiff might make to him, he executed to the plaintiff the aforesaid bill of sale or mortgage of the articles therein enumerated, to become null and void, upon the said Harpin, his heirs, executors, &c. paying said debt, and any other advancements that should be made. The question of law which arises out of these facts, is, whether this account is assured by specialty given for it, witnessed by subscribing the debtor's name, within the meaning of the statute. If a debtor should subscribe such an entry as this, in the creditor's book, viz. I acknowledge I am indebted to A B, on book, and will pay the balance that shall be found due upon an adjustment, no one will pretend but that this would be an assuring the balance by specialty, subscribed by the debtor. If instead of its being wrote in the creditor's book, it should be wrote upon a separate paper and delivered to the creditor, it would make

no difference, for it would be evidence of his indebtedness, independent of the creditor's oath. Now where a debtor, as in the present case, in writing under his hand and seal, acknowledges his indebtedness by book, to a certain amount, and not only agrees to pay it, but to render it perfectly secure, mortgages property to a large amount to his creditor, which is to be the creditor's forever, if he fails to pay the debt effectually, secures but doth not extinguish nor pay the debt, so but that the creditor might recover the debt or hold the pledge.

The court supposed this was an effectual way of assuring the account or balance by specialty, and subscribed by the debtor—and this did not change the nature of the debt, that still remained a debt by book, although assured in the manner aforesaid.

This judgment of the superior court was reversed upon a writ of error, in the supreme court of errors, at their session in June A. D. 1797, for the following reasons—after stating the case, they say, judgment reversed—for that the writing recited in the plaintiff's replication, and relied upon as a specialty within the meaning of the act of limitation, is nothing more than a bill of sale of certain goods and chattels specifically named in it; and the sum of £43-8-9, the amount of the debt confessedly due at the date of said writing, was undoubtedly a good consideration, and well secured by it; but it is difficult to see how such an instrument and of such a tenor, can be construed to be a specialty, assuring the articles charged on the plaintiff's book against said deceased, as well after as before the date of said instrument; and at the same time reserving to the plaintiff a right of action to sue for and recover on book. The debt due at the date of the instrument referred to, was in judgment of law, paid and absorbed by the transfer of the goods and chattels mentioned in it; one went against the other, and no action could afterwards be maintained for the same debt; it being the very case and consideration of the transfer. As to the latter articles charged after the date of said instrument, more than seven years had

elapsed before the date of the plaintiff's writ—how can it be said that these were assured by the same writing, called a specialty, when they were delivered afterwards? Doth the act of limitation intend a specialty given anterior or posterior to an existing debt? Doubtless the latter, and no other, as then it is obvious the limitation of book debts was intended principally to prevent injustice to the heirs and representatives of deceased persons; so the act made for that purpose ought to receive the most favorable construction in that respect. We are therefore of opinion that the judgment of the superior court is erroneous.

Litchfield County, Jan. Term, A. D. 1796.

Amos Calkins *vers.* John Munsel and wife
Elizabeth.

PETITION in chancery, shewing that Stephen Calkins mortgaged about two hundred acres of land to said Munsel and wife, to secure the payment of a sum of money he owed them—That said Stephen had conveyed to the petitioner since said mortgage, thirty-five acres of the same tract, and that the residue of said two hundred acres was conveyed to other persons, praying that he might be permitted to redeem said mortgaged premises by paying to said mortgagees the whole of their debt; and as the said John Munsel the husband was now dead, and the whole of said mortgaged premises had become vested in the said Elizabeth his widow, he prayed that upon paying said debt to her, she be decreed to reconvey all her right in the same to him.

A purchaser of a part of the mortgaged premises, may redeem the whole, paying to the mortgagee the whole of his debt.

The court, upon hearing said petition granted it; and declared, that upon the petitioner's paying said Elizabeth the whole of said mortgage, debt and interest, she should release all her right to the same,

LITCHFIELD COUNTY,

which would put him in the place of said mortgagees with respect to the original mortgagor and his assigns, as to all the lands, except said thirty-five acres which he had purchased.

Elijah Lawrence *vers.* Elijah Phelps, Norton, &c.

That notice was given to the adverse party to a deposition, may be proved by parol testimony. In an action of trespass for breaking the plaintiff's house and beating his wife, the court would not admit any evidence as to beating his wife.

ACTION of trespass—declaring, that on the 17th of December A. D. 1794, the plaintiff being from home, the defendants with force and arms beset the plaintiff's house, his wife and family being in it, broke the door and windows, terrified his family, and threw a billet of wood, which hit and wounded his wife in her arm, &c.

The defendants plead severally that they were not guilty. Issue to the jury.

A deposition was offered, taken within twenty miles of the defendants, and the justice had not certified that they had been notified. The justice who took the deposition, and the officer who served the notification were admitted; the officer to testify that he served and returned the citation to the justice, and the justice that said citation was returned to him, with service endorsed upon it; and that it was an omission of his, that it was not certified in the caption—and the deposition was admitted.

The defendants objected against any evidence being given of the injury done to the plaintiff's wife, because she might have a separate action with her husband for the injury done her.—By the court, the evidence was not admitted. From this opinion, Judge Root dissented—This is an action of trespass, for breaking the plaintiff's house, terrifying his family, and wounding his wife; for each of these the plaintiff may have an action of trespass, or he may join them all in one action, and recover for the loss he has sustained, by the wounding of his wife, the loss of her company and service, and the cost of her cure,

notwithstanding she may have an action with her husband for the personal injury—yet this action will be a bar to any action instituted for the same cause.—In an action upon the case for seducing away and debauching the plaintiff's wife, per quod consortium et servitium amisit, or for enticing away his servant, whereby he has lost his service, special damages must be laid, for they are the gift of the action. But for an act of violence committed with force and arms as beating his servant, or his wife, and wounding them, trespass will lie, and damages for the loss of service and expenses of cure, may be recovered; notwithstanding in both cases the wife or servant may have an action for the personal injury.

Sheriff Lord *vers.* Benton, &c.

ACTION of debt on bond, for £50, dated 13th November 1794, which the defendants had never paid.

The defendants plead in bar, that said bond had a condition annexed to it, which was, that one Joseph Peirce, who was in gaol at Litchfield, on several executions, mentioned in the condition of said bond, should abide a true and faithful prisoner, and not depart without leave or until released by due order of law—and alledged that said Peirce did, in the night of the 20th of December A. D. 1794, and at divers other times in the night season, between 20th and the 24th of March A. D. 1795, secretly and without the consent and knowledge of the plaintiff, go out of prison, and sleep with his family, and return again to prison within the six hours of his departure at each time, and was there held and confined on said executions until the 24th of March A. D. 1795; when the plaintiff, who was then wholly ignorant of the said Joseph's having gone out of gaol as aforesaid, took the said Joseph for other misconduct, and locked him up in close gaol, in virtue of said executions, and there held him until the 20th of April A. D. 1795, when said Joseph broke gaol and made his escape, through the in-

If a prisoner who has the liberties of the prison on bond, escapes, it is a negligent escape, and the sheriff may re-take him.

If the sheriff is not liable to the creditor, nominal damages only are given against the bondsmen.

LITCHFIELD COUNTY,

sufficiency of the gaol. That said Joseph had not escaped or departed from said gaol in any other manner and time than as aforesaid, and that no action had been commenced therefor before the present.

The plaintiff demurred to the plea. And judgment—That the plea was insufficient, and for twenty shillings damages, because the sheriff was not liable to the creditor, but the county. Peirce's going out of prison as stated in the plea, was an escape, and a breach of the condition of the bond, given to secure against it—and the sheriff might have made fresh pursuit and retaken him, or have taken his remedy upon the bond at his option. Peirce's escaping and returning again to prison, and remaining there, and his being locked up by the sheriff, can have no effect to purge the breach of the condition of the bond, of which the plaintiff was wholly ignorant. In such case, should the sheriff pursue and retake the prisoner, he would unquestionably have an action on the bond for the cost and trouble in retaking him. See the case of sheriff Abel *vs.* Bennet, Fairfield, August 1789, Root's Reports, 1 vol. 127—and sheriff Lord *vs.* Atwood—adjudged this term, on motion after verdict, where only nominal damages were given, because it appeared the plaintiff by his own fraudulent conduct, had barred himself of any recovery against the sheriff.

Lynde Lord, Esq. sheriff *vers.* Atwood and Stoddard.

A creditor fraudulently procuring his debtor, who had the liberties of the prison on bond, to escape, to subject the bondsmen; may be plead in bar of

ACTION of debt on bond, for £100, dated the 20th of November A. D. 1794, which the plaintiff alleged the defendants had never paid.

The defendants plead in bar, that said bond had a condition annexed to it, which was, that Amaziah Prentice, who was imprisoned in Litchfield gaol, on an execution in favor of Joseph Peck, for the sum of 45*s.* debt and cost, and officers fees, and for subsistence, should abide a true and faithful prisoner, &c.

That said Prentice did abide a faithful prisoner until the 4th of February A. D. 1795, when said Peck procured one Vespacius Eastman, to be committed to prison, for the express purpose of his persuading and assisting said Prentice to make his escape from gaol, in order to subject the defendants on their bond—and the said Eastman, did in compliance with said Peck's direction, persuade and assist said Prentice to make his escape on said 4th of February aforesaid; and thereupon that said Peck did consent and agree that said Prentice should go out of prison and escape at the time aforesaid.

an action by the
sheriff against
the bondsmen.

The plaintiff replied, and traversed the said Peck's procuring said Eastman to be imprisoned, for the purpose of assisting said Prentice to make his escape; and also said Eastman's persuading and assisting him to escape by said Peck's directions; and said Peck's consenting to said Prentice's going out of gaol at said time. On which the parties were at issue to the jury, who found that said Peck did procure said Eastman to be imprisoned for the purpose of assisting said Prentice to make his escape; and that said Eastman did persuade and assist said Prentice to escape by said Peck's direction, and that said Peck did consent to his going out of gaol at said time; and found for the defendants their cost. What Peck had said, was allowed to be testified on the trial against the plaintiff, as the action was for his benefit.

The plaintiff after verdict moved for judgment in his favor, said verdict notwithstanding, on the ground that a breach of the condition of said bond was admitted and confessed in the pleadings:

By the court—The plaintiff must have judgment; but as it was proved in the trial that the creditor had so conducted as to have no claim of damages on the plaintiff, he shall recover only nominal damages and his cost. Vide the case, Lord, sheriff *vs.* Benton, ante.

LITCHFIELD COUNTY,

Jacob Willet *versus* Seth Overton and John Eldridge.

A court of chancery will not dispose where the petitioner has not acquired title by law.

A deed until recorded at length, is no evidence of title at law except against the grantor and his heirs.

A court of chancery doth not make titles where there is none, but compels persons who have got the legal title unjustly and by fraud, to restore it to those, who in justice and good conscience ought to have it.

PETITION in chancery, shewing that on the 10th of March, A. D. 1783, James Holmes mortgaged to Joshua Wells 106 acres of land in Salisbury, to secure the payment of £500, by the first of November. A. D. 1783; which deed was entered upon, received for record, and lodged with Asa Hutchinson, town clerk, unrecorded. That in January A. D. 1784, said £500 not being paid, said Wells mortgaged the same lands to the petitioner, defeasable upon his paying to him £277 lawful money; which deed was entered upon, received for record, and lodged with the town clerk unrecorded. That on the 27th day of May, A. D. 1784, both said sums being unpaid, said Holmes, Wells and said Seth Overton combined together to defraud the petitioner; and they applied to the town-clerk and got up said deed from Holmes to Wells; and then said Holmes executed a deed directly to said Seth, without the privity or knowledge of the petitioner; whereby the chain of his title was broken: And said deed from said Holmes to said Seth was recorded at length; and said Seth had since conveyed said lands to said John Eldridge, who was privy and knowing to said fraudulent transactions and to the petitioner's deed from said Wells. That the said Wells and Holmes were both bankrupts. Praying to be relieved against said deed from said Holmes to Overton and from Overton to said Eldridge.

Said Overton and Eldridge, by way of answer, brought forward a cross-bill; which had been duly served on said Willet. Stating that on the 29th of November, A. D. 1783, said Wells was indebted to him said Overton £300, that he applied to him for payment, and said Wells told him if he would pay Nathaniel Platt a bond of £270 on interest, for which said lands were mortgaged for security, he would give him a deed of said lands to secure both sums, as said Holmes had paid nothing on said mortgage; which he did, and took a mortgage deed of said lands

from said Wells, which deed was defective, and being informed and verily believing that said debt was paid to Willet, or otherwise secured, he took a deed from Holmes, and they applied to the town clerk and got up the deed from Holmes to Wells aforesaid, it not having been recorded—And appealed to the conscience of said Willet to disclose on oath or affirmation, the truth of the fact respecting his being paid his said debt, or having it otherwise secured.

Said Willet upon his affirmation declared, That in the summer of A. D. 1783, Wells was indebted to him £866 York money, for goods—and that he took a mortgage of some land in the state of New-York, which was an inadequate security. That he paid Nathaniel Platt £350 York money to redeem a mortgage made to him by said Wells, of land in the Nine Partners; and took a mortgage of it from Wells; also paid said Platt the sum of £277 lawful money to redeem a mortgage given by Wells of this bond, to said Platt; and took said deed from said Wells to secure what he paid said Platt, and as an additional security for his own debt; that he also took an assignment from said Wells of the £500 bond given him by Holmes; and that the lands in the state of New-York had been sold for £800; which left a balance due him of £416 York money, besides the £277, money he paid Platt, for the Salisbury lands; and produced the bond from Holmes to Wells, assigned to him, and that he knew nothing of said Overton's debt or deed—and that he had never received any part of said £277, and had no other security for said debt—and that he employed said Platt to carry on said suit, as he was ignorant of the law, and lived at a great distance from the court, and Platt was to receive the one half of what he should recover.

Said Overton, &c. also plead in bar of the petitioner's recovering—That said Willet commenced his suit at law against said town clerk, therein charging him with fraudulently combining with said Wells, Holmes and Overton, to defraud him by delivering up said deed from Holmes to Wells unrecorded, after it was

LITCHFIELD COUNTY,

received by him and entered upon, received for record. Which action was tried at the superior court holden at Litchfield, on the 3d Tuesday of August A. D. 1794, when and where verdict and judgment was had and rendered against said town clerk, that he was guilty, and for the plaintiff to recover £30 damages and cost.

To this plea the petitioner demurred—and judgment of the court—that the plea in bar was insufficient. For in that action the recovery was had for the breach of his official duty as town clerk; and only £30, the special damages recovered—and the court gave judgment that said Overton, &c. should take nothing by their cross-bill, as the facts were not proved. And the court upon a hearing on the merits, found the facts alledged in said Willet's petition to be true, and thereupon ordered and decreed that said Eldridge and Overton, reconvey said premises to the petitioner by a good authentic deed, defeasable however, upon their paying the debt due from said Wells to him, which the court found to be £500-2 lawful money, and the lawful interest, by the first of August then next, on pain of forfeiting and paying to said Willet £1000 lawful money—and that either of them might pay to said Willet said debt and interest, by the first of September A. D. 1797.

As the petitioner had been deprived of his security for his debt by fraud, and of his debt also; as both Holmes and Wells had become bankrupts, the question to be determined by the court was—what remedy the petitioner had if any, and how he should be redressed?

By the court—If the petitioner has adequate remedy at law by action of ejectment, or otherwise, this court must dismiss the petition. It is a clear settled principle of law in this court, that where a person has a good and legal evidence of title to an estate, his being deprived of that evidence by fraud, or otherwise by accident, shall not prejudice his right of recovering at law, provided he can prove by other testimony, that

he had the legal evidence of title, and had lost it ; but he never can be permitted, to prove by other testimony a title to an estate, when the evidence he is deprived of, was not complete and legal, and such as could if he had it, be given in evidence of his title.

What are the necessary requisites to a deed, by law, to make it the legal evidence of title ?

By the statute, entitled an act concerning town clerks office and duty, sect. 9th, it is enacted, "that
 " no grant or deed of bargain and sale, or mortgage
 " made of any houses or lands within this state from
 " and after the 1st day of March A. D. 1709, shall
 " be accounted good and effectual in law to hold
 " such houses and lands, against any other person
 " or persons whatsoever, but the grantor or grantors,
 " and their heirs only ; unless the grant, deed or
 " deeds thereof, be recorded at length in the records
 " of the town, where such houses and lands do lie."
 Now the deed from Holmes to Wells was never recorded at length, it could not therefore have been given in evidence of title against any other person, but the grantor or his heirs. And it is certain, that the petitioner cannot be in a better condition, with respect to proving his title, than he would be if he had the deed.

Thus, though the petitioner never had any evidence of title at law to said land, against any person but the grantor and his heirs ; yet there was a deed executed and acknowledged according to law, and lodged with the town clerk, and entered upon by the town clerk, received for record, so that he might have had a mandamus to the town clerk to have obliged him to record the deed.

Under these circumstances the petitioner trusted said Wells, and took a mortgage of said land, and an assignment of the bond, from Holmes to Wells, for his security ; and the respondents taking advantage of said deed not being recorded, by fraud procured it to be delivered up to Holmes, and then took a deed to said Overton, whereby the petitioner is wholly depri-

LITCHFIELD COUNTY,

ed of his security and debt, and hath no adequate remedy at law to recover it back. It remains to be considered whether he has any remedy in chancery for the relief asked for. It is proved in this case, that both Holmes and Wells are bankrupts; that Overton, in combination with Holmes and Wells, whom he induced to assist in getting up said Holmes's deed from the town clerk unrecorded, by imposition and fraud, had prevailed on Holmes to give a deed of said land to him, contrary to what they knew to be just and honest with respect to the petitioner and them. That said Overton had sold said farm to said Eldridge, who was knowing to the fraudulent manner in which said Overton obtained said deed, and the petitioner's claim upon it.

There is no principle in equity clearer than that the petitioner should be restored, to the same condition, as to his security, he was in before; and although he had no legal title against any but the grantor and his heirs, yet in equity and good conscience he ought to have a legal title, and against him who had now got it. And it is the province of a court of chancery to order a decree under a suitable penalty on a person who has got the legal title to an estate by fraud, or without any equity to hold it, to convey it to another who hath the equitable right, but not the legal title.

The court go upon the ground, that the petitioner has not got the legal title, but ought to have it; and that Eldridge has got the legal title, and ought not to keep it, but to resign it up to the petitioner, or pay him his just debt.

This decree was reversed in the supreme court of errors, in June 1797, for the following reasons—

Supreme court of errors, June A. D. 1797. Seth Overton, &c. *vs.* Jacob Willet. Writ of error to reverse a judgment or decree in chancery of the superior court upon the petition of Jacob Willet *vs.* said Seth Overton, &c. rendered on the 4th Tuesday of January A. D. 1796. After stating the petition, plea in bar, and decree of the superior court therein, the supreme court of errors assign the fol-

lowing reasons for the reversal, viz. It was urged by the counsel for the plaintiff in error—That said Willet had adequate remedy at law, and that in two ways, 1st, by ejectment for the farm against Eldridge, the tenant in possession, and 2d, by an action for fraud against those who perpetrated the fraud. The said Overton and Eldridge for ought that appeared, were men of property. It was also urged, that said Willet had obtained satisfaction for the injury by his suit against the town clerk—That the bond to which the mortgage was collateral, was never assigned to Willet, and therefore Holmes might pay it to Wells, as he had done; and Willet in that case must relinquish his claim to the farm, and that the taking away the first deed, operated the same thing. Also, that the court erred in subjecting Overton to a penalty in case of failing to convey that which he had not the power of conveying.

The court gave no opinion upon any of these points, excepting this, viz. That Willet had adequate remedy at law by ejectment against Eldridge the tenant in possession, and because it appeared to them that he had such remedy, the judgment of the superior court was reversed. It will be conceded that courts of chancery in this state are by positive statute, prohibited from exercising jurisdiction in those cases where adequate remedy may be had in the ordinary course of law. The petition charges and the court find that said Eldridge well knew at and before the purchasing of said farm, all the wicked and fraudulent transactions aforesaid of said Overton, and joined with him in said fraudulent transactions; cannot Willet then recover the farm at law, by the ordinary process of ejectment?

It is proper to remark, that the title is still in Willet. The plaintiffs in error, indeed, have attempted to destroy the title, but they have, in truth, only removed the common evidence of the title, and the superior court must have proceeded on this ground, for they have not undertaken to create a title but to

strengthen one which appeared to them to have been weakened by the fraud of the plaintiffs in error.

In a case thus circumstanced, if a court of law be not competent to give adequate redress, it must be, either because they cannot receive the testimony of the facts, or because they cannot render a judgment which shall be adequate to the exigence of the case. If A makes a deed of a piece of land to B, and C is a witness to this deed, and afterwards, to defraud B, A makes a second deed to C, of the same lands, and the last deed is first recorded—the first deed shall prevail at law and destroy the second; yet in the case put, the title is *prima facie* in C; and the evidence from record is entirely in his favor, and the court will establish the title in B, on the proof of these facts. This principle is constantly recognized in all our courts, and entirely acquiesced in. If in this case C had destroyed the book containing the record of B's deed, and then endeavored to substantiate his own, could B have been driven to a different remedy? Again, courts of law constantly admit proof of the contents of notes, deeds, and other documents, it being first made out satisfactorily, that they once existed, and are lost by time and accident; and that too where the party claiming under the instrument would have been compelled to make a protest of it (if a protest in any case be necessary) in his declaration or plea. In corroboration of this idea, Lord Chancellor Hardwick, in *first of Vesey*, 392, says, courts of law admit evidence of the loss of a deed, proving the existence of it and the contents, just as a court of equity does. It has been much litigated at Westminster Hall, whether, if a deed be pleaded, the court will dispense with the production of it, on proof of loss. The law on this subject is now well settled by the decision of *Read vs. Brookman*, 3d term, Reports, 151—where it was deliberately adjudged, that in a plea setting up a deed of release, an allegation that it was lost by time and accident, was sufficient: but it should be remembered, that in the present case, Willet's deed is still in existence, and on the records of the town of Salisbury.

In his action of ejectment, he might certainly read this deed as one part of his testimony, but it will be inquired how he can shew a title in Wells, his grantor ; he can prove that Holmes executed an authentic deed to Wells ; that it was lodged with the town-clerk, to be recorded, and endorsed by the town-clerk, received for record ; and that the plaintiffs in error by fraud and with an intent to defeat his title, procured the deed to be destroyed. Shall then Eldridge, one of the perpetrators of this fraud, defend himself against Willet's claim to the land, by alledging these facts ? If so, a person may set up his own fraud, his own iniquity, as a defence against a righteous claim ; to do which, would be both inequitable and illegal. The deed from Holmes to Wells need not have been left for record, to have operated effectually against Holmes, the grantor. He could never say the title did not pass by his own deed, and Eldridge being found to be knowing to all the facts, and conniving in the fraud, is as much estopped to deny the existence and operation of the deed to Wells, as Holmes himself ; it therefore appears that the testimony might be received, and, when received, would be sufficient to warrant a recovery of this land in favor of Willet against Eldridge.

Secondly, can a court of law render a judgment which shall be adequate to the exigence of the case ? If the preceding reasoning be just, a court of law can establish the title of Willet to the farm, and give him possession, and this is all that Willet can legally claim ; the farm will then be Willet's, liable however to be redeemed out of his hands by payment of the mortgage money, and doing compleat equity on the part of the mortgagor ; in this situation he ought to be placed.

It was urged, indeed by the council for the defendants in error, that Willet's title ought to appear on the town records, the ordinary resort for proof of title to lands, and that it would have appeared there, but for the wicked practices of the plaintiff's in error ;

but that now the records of a court of law must be resorted to. To this it may be replied, that the evidence of title to land derived from the records of a court of competent jurisdiction to decide title, is as high, as that derived from the town record; nay it is higher, for a record of a court is not to be impeached with the same facility as the records of a ministerial officer.

But what makes an end of this objection is, that the record of the superior court, sitting as a court of chancery, is not more accessible, nor does it furnish any higher testimony than the record of the same court sitting as a court of law. If Willet's title is established in either character their records must be resorted to. It appeared to the supreme court of errors, that Willet had adequate remedy in the ordinary course of law, and therefore the interference of the superior court in this case, was erroneous.

Daniels *vers.* Wilcox.

A debtor's person and estate cannot both be hoiden at the same time upon the same attachment.

If an officer injures a defendant by illegal proceedings on a civil process, without the knowledge or privity of the plaintiff, he only is liable.

ACTION of the case, declaring that the defendant on the 27th of September A. D. 1794, prayed out a writ of attachment against the plaintiff, to attach to the amount of £500, in common form, and was granted, in an action brought by the defendant against the plaintiff, for speaking certain libellous words of and concerning the defendant; which attachment was signed by lawful authority in legal form; and was by the defendant delivered to — Marks, a proper officer, to whom the same was directed, to serve and return; and who by virtue of said writ of attachment, attached about sixty acres of the present plaintiff's land, a number of articles of personal estate; also by the same writ of attachment he attached the plaintiff's body, and held both the plaintiff's estate and body, by said attachment at the same time, and compelled the plaintiff to procure bail to obtain his liberty.

The defendant plead not guilty. Issue to the jury. The jury found a verdict for the plaintiff.

The court delivered their opinion upon the law—that a debtor's person and estate could not both be holden at the same time, upon the same attachment—but as it appeared in this case, that this officer made this service of his own accord, supposing it to be his duty, as he judged the estate attached not to be sufficient, to attach the body—and it also appearing, that the officer received no orders from the then plaintiff to make such service, the court returned the jury to a second and third consideration, upon the ground that an officer is the servant of the public, for the benefit of the party—and that the law and his precept must be his guide. And if in making service, by mistake or otherwise, he does an injury to the party, the officer only is liable; unless it appears, that he had the orders of the creditor for so doing—or after knowing what had been done, the creditor approves of it, or takes benefit of the wrong act some way or other.

Hartford County, February Term, A. D. 1796.

Filer and wife Jerusha *vers.* Bissel.

ACTION on bond, given to the said Jerusha when sole, by the name of Jerusha Bissel, dated the 12th of September 1785, for £200.

A sum secured to be paid annually in the condition of a bond, suspended by special agreement.

Plea in bar—that the condition of the bond was, that the defendant should pay to said Jerusha annually on the 1st of December. £3-6 in cash, and four hundred weight of tobacco—That on the 15th of September 1794, said Jerusha being a feme sole, executed to the defendant an agreement in writing; that she would not call upon him for said money or tobacco, unless by the events in providence, she should need them for her support. That she had not needed them for her support; nor had she ever called upon the defendant for them.

The plaintiff demurred to the defendant's plea—and judgment, that the plea was sufficient.

The said Jerusha by her agreement has barred herself from calling for said money and tobacco, unless she needed them for her support; and in that case there ought to have been special notice given.

Cockran *vers.* *Leister.*

After an attorney has appeared in a cause in the county court for the plaintiff, and is entered of record there as attorney to the plaintiff, and the cause appealed, it is too late to challenge his power to appear.

On a hearing in damages, the court will not offset mutual covenants in a deed.

ACTION on a written covenant, in an indenture of lease. The plaintiff lived out of the state—The suit was commenced to the county court by G. Granger, Esq. who appeared in the cause, and was entered of record, as attorney to the plaintiff.

The defendant appealed the cause to the superior court, in September 1795—at which court Mr. Granger appeared for the plaintiff, and the cause came by continuance to this court; and now the defendant challenged his power to appear for the plaintiff.

By the court—Mr. Granger appears of record to be the attorney of the plaintiff, and the defendant by his own admission is estopped to make the challenge at this late day—See *Butler vs. Butler*, 1 vol. Root's Reports, 275.

The case was defaulted, and on a hearing in damages, the defendant offered evidence to prove an eviction, but refused by the court—as the covenants were mutual for quiet enjoyment, and for payment of the rents, the parties have mutual remedies thereon.

Jonathan Bull, Esq. &c. creditors to Ashbel Steel, deceased *vers.* Nathaniel Skinner, administrator of said Ashbel, and ——— Webster.

Chancery will order a purchaser under an ad-

PETITION in chancery, shewing that said Ashbel in his life time, mortgaged a certain piece of land to John Dodd, for £366-16-2—that his estate

was much insolvent; and that upon the petition of said Dodd to foreclose the equity of redemption in said lands, the superior court ordered a decree, that upon said administrator's paying to said Dodd £366-16-2 by the 1st of January 1795, he should release said mortgaged premises to said administrator, for the benefit of the creditors of said Ashbel. That said administrator and said Webster combined together, and paid said Dodd said sum, and obtained from him a deed of release to said administrator, agreeable to said decree; and then said administrator privately sold it to said Webster, for only £380, when said land was well worth £500; and said administrator might have sold it for that sum to sundry persons, who stood ready to have given it—which was a fraud upon the creditors. Praying that said Webster be ordered to release said lands to the creditors, upon their paying what he had advanced.

administrator of an insolvent estate, to give up the purchase if it was unfairly made and at an under value.

The court found the facts stated in the petition, and decreed, that said Webster, upon his being paid the sum by him advanced and interest, deducting the rents taken by the administrator aforesaid, which sum was to be furnished by the creditors, should release the estate back to said administrator, to be disposed of to the best advantage, for the benefit of the creditors and heirs.

Bullock *vers.* *Hosford and Clark.*

ACTION of trover for a quantity of goods.—
Plea—Not guilty. Issue to the jury—and
verdict for the plaintiff.

Judgment arrested for misconduct in the jury.

Motion in arrest—That said jury who tried said cause admitted the constable to be present in the room with them while they were debating and considering said cause, and that the jury had agreed to find for the plaintiff—and while said verdict was writing, one of the jury conversed with the constable on the case, asked him what he thought of it; and the constable

told him his opinion that he thought the court would send them out again.

This exception was demurred to—and judgment, that the motion in arrest was sufficient. For the jury are not to converse with any person, nor suffer any to converse with them, until they have delivered up their verdict in court and it is accepted. Vide 1 vol. Root's Reports, 134 and 429.

Hayden and wife *vers.* Oliver Loomis.

An executor not admitted a witness to prove the sanity of the testator.

APPEAL from a judgment of the court of probate, proving and approving the will of Nathaniel Loomis—Because the testator, said Nathaniel Loomis, was not of sound disposing mind and memory at the time of making his said will.

After the appellants had gone through with their evidences, the appellee offered the executor to the will, to be a witness to prove the sanity of the testator—he was objected against, and by the court not admitted.

John Calder and Janet, his wife *vers.* Caleb Bull and Abigail, his wife.

The general assembly granting a new trial before the court of probate, is not an *ex post facto* law.

APPEAL from probate. The facts in the case were—That in A. D. 1761, Doct. Normand Morrison made his will and gave the estate in controversy to his grand-son Normand. Afterwards he died, and his will was proved and approved—That the grand-son Normand entered and was seised in fee, and so continued until his death, which happened in January, A. D. 1783—Said Normand married Abigail Chancey, the present wife of the said Caleb Bull; and on the 21st of August, A. D. 1779, the said Normand, not then having any issue by his said wife, and being about to go a voyage to sea, made his will and gave all his estate to his wife Abigail, except his dwelling-house which he gave to his sister's son Thomas, after his wife's decease—provided he should live

and return from the British, and should be friendly to the United States ; and made his wife sole executrix. That said Thomas never returned, but died abroad in A. D. 1780. That on the 15th of March, A. D. 1782, said Normand had a son by his said wife Abigail, who was named Normand. And in October, 1782, the said Normand, sen. went to sea without altering his will ; and on his return home in January, A. D. 1783, he died. That said executrix exhibited said will to the court of probate, to be proved and approved ; but said court of probate, considering the subsequent birth of a son a revocation of said will, did not approve said will, and appointed the said Abigail administratrix ; and as the law then was, the son would be heir to the estate, and the widow be entitled to her dower ; and in case of her son's death, she would be heir to him—and did not take an appeal. That since her intermarriage with said Caleb Bull, her son Normand died, viz. on the 10th of February, A. D. 1790. That in January A. D. 1784, the legislature passed a law, That the real estate received by descent, gift or devise from a person's parent, ancestor or other kindred, in case such person died intestate having no children, nor brothers or sisters of the blood of the person or ancestor from whom such estate came or descended, nor legal representatives of them, the same should be and remain to the next of kin to and of the blood of the ancestor from whom such real estate came or descended as afore said.

That said Janet was the only surviving child and daughter of said Doctor Morrison, from whom said estate came by devise and next of kin and of the blood of said Doctor Morrison. And that said Normand the third had left no issue, nor any brothers or sisters, or legal representatives of them, of the blood of said Doctor Morrison. That said Janet had intermarried with said John Calder.

That said Caleb Bull and Abigail his wife made application to the general assembly, shewing these facts and praying that they might have liberty to exhibit said will of said Normand, the grand-son, to the court

HARTFORD COUNTY,

of probate for the district of Hartford, to have the same proved and approved.

That the assembly in May A. D. 1795, granted the petition, and authorized the court of probate to hear said cause, and proceed therein as though no judgment had been heretofore rendered thereon; and that liberty of appeal be allowed to either party to the superior court—that said court of probate, on the 13th of June A. D. 1795, the day set for said trial, by the act of assembly, proceeded to try said cause; and said will was proved and approved by said court. From which decree, the said Calder and wife appealed, and assigned the following reasons—

That by the first article, section 9th of the constitution of the United States, no bill of attainder, or ex post facto law, shall be passed—and by the 10th section, no state shall pass any ex post facto law, to impair any contract, &c. And that said act, decree, and resolve of the general assembly, granting the appellees a new trial in said cause, was contrary to said section in the constitution of the United States—praying that said decree of the court of probate might be disaffirmed.

To these reasons the appellees gave a demurrer. And judgment—that the reasons for the appeal, were insufficient.

By the court—The power of granting new trials was ever exercised by the general assembly of this state; and when in A. D. 1780, they invested the power of granting new trials, in the superior and county courts, in causes which came before them; they reserved the power of granting new trials in all the other courts. This is not in the nature of an ex post facto law, for no law is altered; it is only giving liberty of a new trial before the court of probate, upon a question of fact, viz. whether a will of Norman Morrison, did exist or not? And whether it ought to be proved and approved or not? This cause was carried by way of error, before the supreme federal court of the United States, and there affirmed.

Bowne vers. Olcott, &c.

ACTION of the case, declaring that the defendants in New-York, on the 31st of January A. D. 1792, were indebted to the plaintiff, for goods, &c. the sum of £428-18, and in consideration that the plaintiff would forbear and give day of payment to the 15th of June then next, the defendants gave their note in said New-York, dated the 31st of January A. D. 1792, made payable to Timothy Olcott, or his order, by the 15th of June A. D. 1792, with the interest, for value received—and the said Timothy endorsed on said note, pay the contents to Robert Bowne, value received; of which the defendants were duly notified. And that thereupon the defendants became liable to pay said note to the plaintiff, and in consideration thereof assumed upon themselves and promised to pay to the plaintiff said sum of £428-18, by said 15th of June A. D. 1792, with the lawful interest; that said note and endorsement were made and executed in the state of New-York, and by the laws of the state of New-York said note was, and is negotiable. Breach assigned was, that the defendants not regarding their said promise, had never performed the same.

An action lies in this state in favor of an endorsee, upon a note executed and endorsed in the state of New-York:

To this declaration a demurrer was given. Judgment of the court—That the declaration was sufficient.

By the court—The *lex loci* or law of the place where the contract is entered into, must be the rule for construing the contract—but the law of the country where the suit is brought, must regulate and govern as to the legal remedy, upon such contract.

By the laws of this state, such notes as the note in suit, are not made negotiable; of consequence no such action will lie in favor of an endorsee upon a note executed in this state. But this is no objection to an endorsee, coming from another state, vested with such right, and maintaining an action in this state: a *bona*

side endorsee of a note for value received, is considered as the rightful owner of the note ; and if it is paid to the promisee, the endorsee will recover the money from him ; and if the promisee is a bankrupt, and the promisor has notice of it, and of the endorsement, yet pays it to the promisee, he will be compellable to pay the money again to the endorsee. The endorsee will also retain it against the creditors of the promisee upon a foreign attachment.

The promise is to Timothy Olcott, or order. This promise is attached to Timothy Olcott's order, which was given to the plaintiff. Further, by the laws of New-York, a right of action in virtue of his interest, was vested in the plaintiff by the transactions aforesaid, in his own name, against the original promisors. The bringing the contract into this state, where such notes are not negotiable, and where such right of action would not vest at law, doth not divest the plaintiff of the right of action, which by the laws of New-York were already vested in him.

Tolland County, February Term, A. D. 1796.

Dorcas Woodard vers. Bellamy.

In an action on a promise to marry, evidence admitted both of general character and particular instances of unchastity before and after the promise, upon the ground that the plaintiff's character was kept concealed from the defendant.

ACTION on a promise to marry the plaintiff. Plea—Not guilty. Issue to the jury.

The defendant admitted the promise, and that he had married another woman ; but in excuse or justification for not marrying the plaintiff, he said, that he had been deceived in her character, as to virtue and chastity, and offered evidence of particular instances of unchastity, and to prove that her general character was bad, which was concealed from him until after the promise. This was objected to by the plaintiff ; who said that evidence of facts of this kind, since the promise, would be admissible—but as to

what happened before the promise, would be irrelevant on this issue.

By the court—The evidence was admitted. Whether it will completely justify, or only go in mitigation of damages, cannot be judged of until the evidence is heard. On either ground it is admissible, provided it was concealed from the defendant, at the time of the promise.

Ebenezer Kingsbury vers. Town of Tolland.

WRIT of error to reverse a judgment of a justice, in an action, Tolland against said Kingsbury, declaring, that said Ebenezer was sole executor of Ruth Kingsbury, late of Norwich, deceased—That said Ruth was mistress of Cuff and Phillis; a negro man and woman, whom she owned as servants for life—That in December, A. D. 1773, she liberated and set them free, and soon after died; leaving a clear estate of the value of £500 lawful money—That in A. D. 1776, said Cuff and Phillis, with the consent of said Ebenezer, removed into the town of Tolland, and had there resided and dwelt ever since. And on or about the 10th of February last, they were reduced to want, and the selectmen of said Tolland provided for their relief to the value of £2 lawful money, which was expended for their necessary support; of which the plaintiffs gave notice to the defendant, and requested payment; and thereupon the defendant became liable to pay said sum, and in consideration thereof, assumed upon himself and promised.

Executors are liable for expenses incurred in the life time of the testator for the support of manumitted slaves—and the heirs after.

Plea in bar, that on the 18th of November 1776, said Cuff and Phillis, being free citizens of this state, removed into the town of Tolland, where they had ever since resided and dwelled, without being warned to depart said town; whereby they became legal inhabitants of said town, and liable to be maintained by said town.

Reply, that said Cuff and Phillis were foreigners, born in Africa—that they were owned as slaves by

TOLLAND COUNTY, &c.

Joseph Kingsbury, and by him given to his wife the said Ruth, who liberated them as aforesaid ; and in no other manner were said negroes free citizens of this state ; and that they never gained any legal settlement in said Tolland.

The defendant demurred to the reply of the plaintiffs—and judgment of the justice was—that the reply of the plaintiffs was sufficient.

Errors assigned were—That said reply was insufficient, and ought so to have been adjudged. 2d, That the judgment was against the defendant, in his proper person and goods.

Plea—Nothing erroneous. Judgment—Manifest error.

Two points arose in this case—1st, Whether the heirs, executors, and administrators, were liable generally, if there were sufficient assets for the support of such free slaves, after the death of their master. 2d, If the executor was liable, in what manner was he liable, in his own right or as executor only.

By the court—The statute is, “That all slaves set at liberty by their owners or masters, in case they shall come to want, shall be relieved by such owners, &c. respectively, their heirs, executors, or administrators ; and upon their refusal so to do, the slaves, &c. shall be relieved by the select men of the towns to which they belong ; and said select men shall recover of said owners or masters, their heirs, executors and administrators, all the cost and charge, in the usual manner as in case of other debts.”

By this statute it is clearly made the duty of the owners and masters, their heirs and executors, &c. who liberate their servants or slaves, to provide for their relief, in case of need ; and on their refusal, it is made the duty of the select men of the town, to which such slaves belong, to relieve them, and to recover the charge, of the owners, their heirs, executors, and administrators, in the usual manner, as for any other debt.

The judgment was reversed upon the last point assigned, for error ; that the action lay against the said Ebenezer, as executor only, to recover out of the effects of the said Ruth, in his hands, and not against him in propria persona, for expences incurred in the life time of the testatrix. But for expences incurred for their support since her death, the heirs to whom by law they would have belonged, had they not been manumitted, are liable.

Windham County, March Term, A. D. 1796.

Andrew Kingsbury, Esq. State Treasurer *vers*
John Phips, &c.

SCIRE FACIAS, declaring, that upon the complaint of William May, of Woodstock, grand jurymen, dated 15th of April A. D. 1793, and exhibited to John McClellan, Esq. justice of the peace, against Moses Phips, of Thompson, for forging and passing a certain note of hand, for £23 lawful money, in the name of William Gleason, dated the 9th day of May A. D. 1792, the said Moses was arrested and had before Nathaniel Marcy, Esq. of said Woodstock, justice of the peace, April 18th A. D. 1793 : who gave judgment that said Moses should become bound with surety to the treasurer of the state, in the sum of £100, to be paid upon condition, that he said Moses, should fail to appear before the then next superior court, to be holden at Windham, on the 3d Tuesday of September, 1793, and to answer to said complaint, and to abide the order of court thereon. And the said John and Moses Phips, thereupon gave a bond of recognizance conformable to said order or judgment ; copies of which proceedings and bond were transmitted to the superior court, holden at Windham, on the 3d Tuesday of September A. D. 1793, and entered in said docket—at which court said Moses being

A recognizance taken to the state treasurer in a criminal prosecution, not within the statute of limitation.

A justice's jurisdiction not restricted to the town in which he lives, in criminal cases.

WINDHAM COUNTY,

three times duly called, made default of appearing, whereby said bond became forfeited.

Scire facias, dated 26th day of August 1794.

The defendant plead in bar, that said justice Marcy, was an inhabitant of the town of Woodstock, and said Moses was an inhabitant of the town of Thompson, at the time of holding said court, and said court was held in the town of Thompson, and that there was at that time two justices of the peace residing and dwelling in said town of Thompson, qualified to try said cause. And that said scire facias was not commenced within twelve months from the time of calling said bond in the superior court—that said bond was called on the 18th of September 1793, and said writ was dated the 26th of August, and served on the 3d of September 1794; and that said William May was not a grand juror of the town of Thompson, but of the town of Woodstock, at the time of making and exhibiting said complaint, and that said preecs and bond were illegal and void.

A demurrer was given to this plea by the attorney for the state.

The exceptions taken by the defendant were—1st, That said justice Marcy belonged to Woodstock, and went out of his town into Thompson, to hear and decide said cause, when there were justices in said Thompson that were qualified to judge in said cause.

2d, That said grand juror May belonged to the town of Woodstock, and said Moses Phips to the town of Thompson, and the offence was alledged to have been committed in said Thompson.

3dly, That said scire facias was not commenced until more than twelve months had elapsed from the time of calling said bond.

Judgment—That the plea in bar was insufficient.

By the court—A justice in criminal matters, is not confined in the exercise of his office to the town where he belongs, as he is in civil causes. This

bond is not one of those bonds mentioned in the statute, which requires that the scire facias should be brought in twelve months from the final judgment—and that an irregularity in the original complaint cannot be taken advantage of by the bondfman, on the scire facias is an adjudged point. Robbins *v.* Bacon, Windham March 1793, 1 vol. Root's Reports, 548.

French vers. Potter.

ERROR to reverse a judgment of a justice in an action of trespass, brought by Potter against French.

A justice has no more authority to judge of a plea of title on a demurrer, than on the merits.

The defendant plead, that the land and place where said facts were done, was at the time of doing them his own property in fee, to use in manner as he had done—and offered to give bonds to prosecute his title before the county court.

The plaintiff demurred—And the justice proceeded and gave judgment, that the defendant's plea was insufficient, and for the plaintiff to recover.

Error assigned was, that the justice had no jurisdiction to decide upon said plea. Nothing erroneous plead. And judgment—manifest error.

The justice had no more authority to judge of said plea of title on demurrer, than on the merits.

Thomas Lee vers. Elifha Abbe.

ACTION of ejectment for a piece of land. Plea—no wrong or disseisin. Issue to the jury.

A conveyance originally fraudulent as to creditors, may become good and valid as to bona fide purchasers for a valuable consideration, where they have not had any notice of the fraud.

The plaintiff's title was under Joshua Elderkin, who owned said land in A. D. 1783, and was indebted to the plaintiff a large sum, for which he recovered judgment and execution in January 1794, and levied upon this land as the property of said Elderkin. The defendant admitted that he was in possession; and set up a deed from said Elderkin to his son Joshua Booth Elderkin, for the consideration of £360, ex-

WINDHAM COUNTY,

pressed in the deed—also a deed from said Booth to Edward Badger for a valuable consideration paid, dated in January A. D. 1786; and two deeds from said Badger to the defendant, for a valuable consideration paid, dated, one in March, 1787, and the other in January A. D. 1793. It appeared upon the trial that the deed from Joshua Elderkin to his son was not suspected by any body to be fraudulent, until within about two years; though upon the evidence, that deed appeared to be very suspicious, and to have been given to defraud creditors, yet that said Badger and said Abbe were bona fide purchasers for a valuable consideration and without notice of any fraud. In this case, the creditors of Joshua Elderkin, he being a bankrupt, were admitted as witnesses.

The jury found that the defendant had done no wrong or disseisin, which was accepted by the court. Judges Sturges and Mitchell dissented from the verdict, which drew out the opinion of the court upon the law in the case.

By the court—Admitting the deed from Joshua Elderkin to his son Booth to be fraudulent, our statute is, “That all fraudulent and deceitful conveyances of land, tenements, &c. made to avoid any debt or duty of others, shall, as against the party or parties only, whose debt or duty is so endeavored to be avoided, their heirs, &c. be utterly void; any pretence or feigned consideration notwithstanding.

“And every of the parties to such a fraudulent conveyance, bond, &c. who being privy thereto, that shall wittingly justify the same to be done bona fide and upon good consideration, &c. shall forfeit one year’s value of the lands, lease, rent, &c. and the whole value of the goods.”

The statute has provided a double guard, against fraudulent deeds and contracts; in the first place by declaring them void, as to the parties, only, whose debt or duty is endeavored to be avoided thereby; and also annexes a penalty upon the parties who are privy thereto, and wittingly justify the same to have

been done bona fide, and upon good consideration.— Fraud is predicable only of a moral agent, and science and intention in the agent, are essential to constitute the fraud, and to implicate him in guilt. If a person sells his property with a direct view of defrauding his creditors, to another who is totally ignorant of his designs, and pays him a valuable consideration for it, the statute doth not extend to affect such a purchaser, he will hold against the creditors of the seller, because he is a bona fide purchaser for valuable consideration, without notice.—So where there is a fraudulent conveyance, and the purchaser is privy to the fraud, and active in it, and afterwards a third person purchases of him, bona fide, for valuable consideration, and without notice of the fraud, he is a fair purchaser and comes honestly by the estate, and will hold it against the creditors of the first vendor.

By a fraudulent deed, the legal title is passed from the grantor and vested in the grantee, subject only to the lien which the statute attaches to it, on the score of fraud, in favor of creditors, and bona fide purchasers; a third person therefore, who purchases of a fraudulent vendee, for valuable consideration, and without knowledge of the fraud, has got the legal title vested in him to all intents, and he certainly stands in equal equity with the creditors of the first vendor; and the law will never divest one of a legal title, in order to invest another with it, where there are no equitable reasons or considerations for doing it. The case then is reduced to this, the honest creditor, by the fraudulent conveyance, is thrown out of his debt; the honest and fair purchaser, if the creditor can recover the estate from him, must lose the money he paid for it. The equity then between them is perfectly equal, and the purchaser has got the legal title; but if he had not the legal title, neither law nor equity will take an estate from one and give it to another, without any reason for doing it, as must be the case, where both are in equal equity and neither has the law

title. But in this case the defendant has the legal title, and without any fraud in him.

Further, it is the fraud in the conveyance, that makes it void by the statute, as to creditors, &c. and it is the party only, who is privy to, and wittingly justifies the fraud, that the statute punishes ; and it is as necessary that there should be two parties to the fraud in a contract, whose minds meet in order to make it void, as it is that there should be two parties to make a contract.

Judges Sturges and Mitchel dissented, upon the ground that the statute declares all fraudulent deeds to be void as to creditors ; that this is a lien attached upon the estate in the hands of the grantee, and no after transaction of his, or any other, can remove it, but it adheres to the estate into whosoever hands it comes, though ever so honestly ; and that it would in a great measure defeat the salutary design of the statute, if such a construction should be adopted, for debtors would contrive together with some confidential person to take a deed of the bankrupt's estate to cover it from his creditors, and then to sell it to some honest purchaser, who was ignorant of the fraud, and the creditors would be defeated of their debts at a stroke, and be remediless. Further, this statute was made to suppress fraud in conveyances—it ought therefore to have a liberal construction, in suppression of the mischief, and in advancement of the remedy, and by this rule of construction, the statute undoubtedly meant to hold the estate fraudulently conveyed, for the creditors, in whosoever hands, and however honestly, as to the holder, it may have come. ;

New-London County, March Term, A. D. 1796.

Gurdon Hewit verf. Samuel Morgan.

ACTION on the covenants in an indenture of apprenticeship—declaring that the defendant on the 26th of June A. D. 1790, was guardian to Henry Holmes, a minor sixteen years and three months old.—That he put and placed him an apprentice to the plaintiff until he should arrive to the age of twenty-one years ; and agreed that he should faithfully serve the plaintiff until that time, to learn the trade of a shoemaker, tanner and currier ; with other covenants in said indenture. That said Henry entered into the plaintiff's service, and lived with the plaintiff as aforesaid, until the 15th day of September 1792, when he left the plaintiff and his service—and that he had ever since deserted from the plaintiff, whereby he had lost his service.

An action lies on the covenants in an indenture of apprenticeship against the guardian, for the desertion of the apprentice.

To this declaration a demurrer was given by the defendant, who took the following exceptions—1st, That the plaintiff's remedy was against the minor—And 2d, That the terms made use of in the indenture did not amount to a covenant.

Judgment—That the declaration was sufficient—Windham March 1772, *Wales vs. Farnum*, action on covenants, in an indenture of apprenticeship, for the minor's running away with his master's horse, saddle, and 40*s.* in money, brought against the guardian—adjudged to lie upon demurrer to the declaration—same point, determined this circuit at Haddam, in case of *Paddock vs. Higgins*.

Calkins verf. Lee.

ACTION of the case for words. Question, whether a witness must testify what the defendant told him in confidence, and upon a promise not to disclose.

Voluntary communications are to be testified, tho'

made under an
injunction of
secrecy.

By the court—If it is a voluntary communication, and the adverse party is interested in the testimony, the witness must testify. Attornies are under oath to keep their clients secrets, and may not disclose them. See *Mills vs. Griswold*, 1 vol. Root's Rep. 383.

Geer vs. Huntington.

The declaration of the mistress to her servant, that he should be free at twenty-five years of age—adjudged to amount to a manumission at that time.

ACTION for the service of a negro boy, who was born a slave, and was over twenty-five years of age.

The plaintiff claimed him by a bill of sale from Mrs. Stanton, his mistress. The defendant claimed the boy to be free by force of a manumission from his mistress, who was now living.

The evidence was, that Mrs. Stanton had said, that the negro boy should be a servant to nobody but to her; and that he should be free at twenty-five years of age. At twenty-five the negro boy left his mistress, and entered into the service of the defendant, and for that, this action was brought.

Verdict for the defendant, and accepted by the court—upon the ground, that the declaration of the mistress made to the servant, that he should be free at twenty-five years of age, amounted to a manumission.

Joseph Williams vs. Lydia Lathrop, Joseph Perkins and Jesse Breed of Norwich, and John Luke of Demerara, in the dominion of the states of Holland, executors of Elisha Lathrop, deceased.

A creditor who has not made out his claim against an insolvent estate before the

APPEAL from an order of the court of probate for the district of Norwich, made on the 18th of January A. D. 1796, accepting the report of commissioners, upon the estate of said Elisha Lathrop, represented insolvent—for the following reasons, viz.

That the appellant exhibited to said commissioners, an account against the said Elisha's estate, for transactions in said Demerara, in which he acted as sole agent for the plaintiff; and also in which he acted as joint agent with said John Luke, to the amount of 27,000 dollars which he claimed to be due; and that said commissioners disallowed and rejected his said claim unjustly and made their report without it; whereas said commissioners ought to have allowed it: and said court of probate had accepted their said report.

commissioners, has no remedy by appeal to the superior court.

This judgment was reversed by the supreme court of errors.

The appellees plead in abatement of said appeal—That by law no appeal would lie in such case, that the determination of commissioners, upon the claims of the creditors was final and conclusive upon the creditors, and neither the judge of probate nor this court, had power to judge after them where they had disallowed a claim of this nature, merely on the ground of their having misjudged.

The appellant demurred to the plea in abatement—and judgment, that the plea was sufficient.

By the court—The statute entitled an act for the equal division and distribution of insolvent estates, after prescribing the mode of proceeding, that commissioners shall be appointed, and how they are to proceed and make their report of the claims allowed by them to the several creditors, to the court of probate, has this proviso annexed to the 3d section in said act, "Provided always, that notwithstanding the report of any such commissioners or allowance thereof made by the court of probate, it shall and may be lawful to and for the executors or administrators aforesaid to contest the proof of any debt at common law."

And in the 6th section it is enacted, "That whatsoever creditor shall not make out his or her claim with such commissioners before the full expiration of the time set and limited for that purpose as aforesaid, such creditor shall forever after be debarred of his or her debt; unless he or she can shew or find

"some other or further estate of the deceased not before discovered, and put into the inventory."

The simple question in this case is, whether by the statute, the report of commissioners on an insolvent estate, is not final and conclusive upon creditors, as to their claims, so that neither the court of probate nor this court have any authority to revise and correct their doings in cases wherein they have disallowed the claim of a creditor, merely upon the ground that they have misjudged upon the evidence.

The statute explicitly gives liberty to the executor, &c. to contest the debts, notwithstanding they have been allowed by the commissioners. And as explicitly declares that every creditor who does not make out his claim before the commissioners, &c. shall be forever after debarred of his debt, unless, &c. It seems, as though there could be no room for a doubt on this point; a law cannot be made more explicit,—but could there arise a doubt on the point, the repeated decisions of this court and the length of time they have been acquiesced in, has rendered it as fixed and settled a point of law, in the opinion of the court, as any in the whole circle of our jurisprudence. Vide the case *Phelps vs. Edwards*, administrator on the confiscated estate of B. Arnold, 1 vol. Root's Reports, 96; and *Mary Williams*, administrator of Nathan Whiting *vs. Executors of Thomas Darling, Esq.* 1 vol. Root's Reports, 356.

This judgment of the superior court was reversed by the supreme court of errors, in June A. D. 1796, (after stating the case) for the following reasons, viz. The question in this case, is not whether the present plaintiff stated to the superior court sufficient reasons for the reversal of the decree of the court of probate, but merely whether an appeal lay from that decree. The superior court by abating the appeal have determined that it did not. Whether an appeal lies in any supposed case, is one question, and whether the appellant can take any benefit of the appeal is another question. The court will not therefore on discovering

that the appellant has brought before them an idle appeal, without any good cause, abate the appeal, where the law clearly admits it. That an appeal lies to the superior court from every judgment, sentence, decree, determination, denial or order, of a court of probate, cannot admit of a question. The only question then is, whether there was in fact any judgment, sentence, decree, determination, denial or order of the court of probate, upon which this appeal is grounded? That there was what is called a sentence or decree of said court of probate, accepting the report of commissioners is averred, and appears by the whole record, and is not denied; but still, if the court of probate had no authority to pass a decree, allowing or disallowing the report of the commissioners, then there is no decree in the case. The only point in the question then is, whether the court of probate has authority to pass any decree or sentence allowing or disallowing the report of commissioners? That the court of probate has this power may be clearly inferred, from the statute concerning equal division and distribution of insolvent estates; which provides, that notwithstanding the report of commissioners, or allowances thereof made by the court of probate, it shall and may be lawful to and for the executors or administrators, to contest the proof of any debt at the common law. The words "or allowances thereof made by the court of probate," if they do not expressly create authority in the courts of probate to allow or disallow, either totally or partially, a report of commissioners, yet they clearly imply, that the legislature understood they had such power, if not by the express words of the statute, at least by implication, by reason and nature of the case; for otherwise, the words can have no meaning at all. But it is a good rule in interpreting statutes to give them such a construction that every sentence and word may have, if possible, a consistent meaning, because the legislature are not supposed to speak absurdly or inconsistently. Indeed if this inference is contrary to other express provisions of the statute, it must be given up. The statute generally provides, that the commissioners being sworn, and

following certain directions prescribed in the statute, or given by the judge of probate, shall receive and examine all claims ; and at the end of the time limited, shall make report, and present a list of claims to the judge—that if on report made, the estate appears to be insolvent, it shall be sold, under certain restrictions, and the avails applied, after charges and privileged debts are satisfied, to pay the creditors contained in the report, in proportion ; and that all creditors who shall not make out their claims with the commissioners before the limited time expires, shall be forever debarred. Now it will be admitted that it is the exclusive province of commissioners to allow or disallow the claims against an insolvent estate, except in the case excepted, that no other forum is competent to this, and that their doings are regularly conclusive ; but still their doings may and must be set aside, for certain causes. If the commissioners are interested, if they have neglected to give proper notice of the times and places of their meetings—if they have been corrupted, if they have not given the concerned a fair and impartial hearing, their doings ought to be set aside, and a new commission issued. It will on all hands be agreed, that a remedy must be had in such cases as these, by those who are affected, whether they be heirs, executors, administrators or creditors, and setting aside the doings of the commissioners, seems to be the proper and only remedy suited to the case : to turn the aggrieved over to the courts of common law for a remedy in these cases, while the judge of probate is to regard the report of the commissioners and to proceed upon it as good, would be absurd in the extreme ; because it would be to create several jurisdictions with powers subversive of each other : and a legal settlement of an insolvent estate in a court of probate, could have no operation or effect at all to conclude any one concerned ; and would amount to a total repeal of the statute in all cases like those above supposed.

From the reason and nature of the case then, the court of probate must have power to disallow a report

of commissioners, where such exceptions can be made against it, for otherwise the estates can never be settled according to the provisions of the statute; and when disallowed, the proceedings under the commission will be considered as a nullity, and the statute of limitations will not attach upon those who have not exhibited their claims. But if the courts of probate have power to disallow reports of commissioners for such reasons, then it will follow that they have a right to allow them, if upon enquiry no good and valid objection appears against them; the one seems necessarily to involve the other, and if they have power in any case to pass a decree, allowing or disallowing the report of commissioners, it will follow that they have in all cases; and if they misjudge, the remedy is by appeal.

Nathaniel Chancey *vers.* Ambrose Strong:

ACTION of indebitatus assumpsit for the rents and improvements of certain lands belonging to the plaintiff's wife, of which the plaintiff was seised in her right, and of which the defendant had the use and improvement from the 6th of February A. D. 1788, to October A. D. 1794.

A writ directed by the authority signing it, to an indifferent person to serve, may not be altered by the party, so as to make a different writ of it.

This writ was first dated in October A. D. 1794, and made returnable to the county court, to be holden at New London, on the 4th Tuesday of November A. D. 1794, and directed by the assistant who signed it to John Gilbert, of Hebron, an indifferent person, to serve—but as said writ did not get served for November court, the plaintiff altered the date of the same to the 31st of March A. D. 1795, and made it returnable to the county court, to be holden in June A. D. 1795; said writ was served and returned by said John Gilbert, without any new direction by the assistant who signed it.

The husband is entitled to the rents and profits of the wife's lands.

The defendant plead in abatement, the abovesaid state of facts, and averred that the authority signing said writ did not on said 31st of March, nor at any

NEW-LONDON COUNTY,

other time, direct this writ to the said John Gilbert, as an indifferent person to serve—2d, That the plaintiff's wife ought to have been joined in this suit.

The plaintiff demurred to the plea. And judgment—That the plea in abatement, as to the first exception, was sufficient; and as to the second insufficient.

By the court.—The authority might have good cause for directing the writ to an indifferent person, when he made the direction, and none for doing it on the 31st of March, when it was dated the second time. Besides, this writ was never directed to said Gilbert to serve by the authority who signed it. As to the second exception, this action would go to the executors of the husband, and not survive to the wife—the husband being entitled by force of the marriage to the rents and profits of the wife's land, during the coverture, he hath right to maintain an action in his own name to recover them.

Raymond *verf.* Barker.

When a defendant recovers judgment for his cost, he has no right to appeal from the judgment.

ACTION of trespass, brought before a justice. The defendant pleaded title to the land—and the justice took a bond and certified the cause to the county court.

The plaintiff demurred to the plea of title. And judgment—That the plea was sufficient, and for the defendant to recover his cost.

The defendant appealed to the superior court; and now the plea was traversed, and upon the declaration and pleadings being read to the jury, who were empannelled to try said cause, the court discovered that there was no appeal taken but by the defendant, who recovered judgment in his favor in the county court, and could not be aggrieved by the judgment; and so had no right to appeal. And thereupon the court ordered the cause to be dismissed, because it was not regularly in this court.

Campbel *vers.* *Crandal.*

ACTION, declaring that the defendant being a conservator to Timothy Badcock, an impotent person; in and by a certain writing or agreement, dated the 3d day of April A. D. 1793, let to the plaintiff for one year, a certain farm belonging to said Timothy, for which the plaintiff was to pay what it should be reasonably worth, in keeping and supporting the said Timothy and his wife. The worth of the rents of said farm and of the keeping and supporting said Timothy and his wife was to be determined by Joshua Badcock and Charles Crandal; and in case they could not agree, they were to chuse a third man.

A conservator is liable upon an express agreement made during his appointment, after he is out of office, and has his remedy against the estate of the impotent person.

That the plaintiff entered into possession of said farm, and improved it one year; and also took and supported said Timothy and his wife during said year; and said Joshua Badcock and Charles Crandal not agreeing in opinion, they chose D. Denison for a third man. And they adjudged and awarded that the rents of said farm were worth £24, and the keeping of said Timothy and wife, was worth £46-16, and thereupon awarded the defendant to pay the plaintiff, for keeping said Timothy and wife over the rents of said farm, £22-16; and the defendant thereupon became liable to pay the plaintiff said sum, and in consideration thereof assumed and promised.

The defendant plead that he did not assume, &c. Issue to the court. The court found that the defendant did assume and promise, and gave judgment for the plaintiff to recover.

The objection made to the plaintiff's recovering, was that before the expiration of said year, the defendant was put out from being conservator of said Timothy, and another was appointed his conservator by the county court; and that judgment ought not to be against the defendant to recover it out of his own estate.

By the court—This action is upon the ground of an express agreement in writing, entered into by the defendant, when he was conservator; and he is holden to see it executed, and his remedy will be against the estate of said Timothy Badcock, in the hands of his present conservator.

City of New-London *vers.* Emerfon.

In an action of indebitatus assumpsit for the rents and profits of land, the defendant may give in evidence, that the title is in another person to whom he is accountable for the rents, &c.

ACTION of the case, declaring, that on the 8th of October A. D. 1792, the plaintiffs were the lawful owners, and well entitled to the use and occupation of a certain lot of land, situate in said city, bounded and described in the declaration; which land at the special instance of the defendant, the plaintiffs suffered and permitted him to use, occupy and improve, for the purpose of keeping a house and shop, by him erected thereon, until the 8th of October, 1794; and that the defendant did actually occupy and improve the said land during said term, and that the use and occupation of said land during said term was well worth £30; and the defendant by means of the premises on the 8th of October A. D. 1794, became justly indebted and in law liable to pay the plaintiffs said sum, and in consideration thereof did assume and promise.

Plea—non assumpsit. Issue to the jury.

The facts in the case were—in A. D. 1785, the city of New-London passed a vote, or bye-law, to lay out these lands with about three-quarters of an acre lying in common in the city, for a highway; and no notice was given to the proprietors of the town, of this vote. No actual laying out ever took place by the mayor, aldermen, &c. agreeably to the act of incorporation, nor any damages assessed to any person.

In the same year, one Nevins applied to the city and obtained liberty of them to erect a dwelling-house and shop on said land; and to enjoy it seven years, at a ground rent of £4 per annum. Nevins soon after sold his right to the defendant, who had a lease from

the plaintiffs of said piece of land for seven years, and to continue his house and shop upon it, at the rent of £4 per annum; which rent the defendant paid. At the expiration of said lease, he applied to the committee of said city for a renewal of his lease, at the same rent, and said committee reported in his favor; which report the city accepted, and the matter lay along and no lease was after applied for or given. And the defendant had had the occupation from October, 1792, to October, 1794, and ever since, and had refused to pay the rents; and upon this, the plaintiffs supposed they ought to recover.

The defendant set up a title to said land upon which the buildings were erected under the proprietors of the town of New-London, and offered this title in evidence. This was objected against by the plaintiffs, as being inadmissible; for by the defendant's taking a lease of the plaintiffs for seven years, and holding under them, and paying them rent, and afterwards applying for a renewal of his lease, he must be estopped to say or to prove, that the plaintiffs had no title.

By the court—This is an equitable action, grounded upon the plaintiffs' right and title to the use and improvement of this piece of land. The defendant having heretofore accepted a lease from the plaintiffs, and paid them rent for it, has made the plaintiffs no title; nor would it be an estoppel in an action of ejectment brought for the land, or of trespass for continuing on the land after the lease expired—and in this action brought for the use and occupation of said land the defendant is not estopped from saying that the plaintiffs have no title—for if he can shew, as certainly he may be permitted to do, that not the plaintiffs but some other person hath the right; it goes directly to the point of the action. The evidence was admitted. 3 Durn. 438. And the defendant produced a record of a vote of the town of New-London, passed in A. D. 1659, that the point of land by the great river, which lies before the lot, that is now Amos Richardson's should be for a forti-

MIDDLESEX COUNTY,

fication, and that this was a part of said point; and that said point for many years was used for a fortification; and had long since been disused for that purpose and was proprietors' land; and the defendant having purchased by deed of sundry proprietors their common rights and had this piece of land surveyed and laid out to him, on those rights, by the proprietors' committee, on the 27th of January 1794, and duly recorded. As the jury returned into court with their verdict, the plaintiffs withdrew their action.

Middlesex County, July Term, A. D. 1796.

Dorothy Smith vers. John Ward.

Parol evidence admitted to disprove the certificate of the justice who took the acknowledgment of a deed, by proving an alibi of the grantor.

ACTION of ejectment, brought for sixteen acres of land, described in the declaration.

Plea—No wrong or disseisin. Issue to the jury.

In this case it was admitted by the defendant, that he was in possession, and that the title was once in the plaintiff; but that she with her late husband Jesse Smith, had conveyed it to him by a deed, duly executed and acknowledged before justice Catling, and certified by him prior to the date and impetration of the plaintiff's writ.

The plaintiff denied that she ever acknowledged said deed, and declared that the justice's certificate of her having acknowledged said deed was false—and offered evidence to prove an alibi, that she was in another place at the time said certificate bears date.

This the defendant objected against, because the acknowledgment of a deed was essential to its validity, and the law had authorised the justice to take the acknowledgment, and had made his official certificate the evidence of the fact, and it may not be encountered with parol proof any more than the certificate of the

clerk of this court. The evidence was admitted to prove an alibi. Judge Root dissented from the opinion of the court in admitting this testimony; he thought it would endanger titles to real property, and be a withdrawing from an officer of the public, that confidence which the law had reposed in him for the general safety. Had it been alledged that a fraud had been practised upon the justice, and one person had personated another, this would be clearly admissible; for this would not falsify the certificate by impeaching the justice, but would defeat its force, by proving a fraud practised by others, as where a judgment is obtained by imposition and fraud.

Chapman vers. Brainard, &c.

ACTION on bond, for £500, dated the 8th of November A. D. 1785.

A judgment in an action on book no bar to an action on bond.

Plea in bar—that said bond had a condition annexed to it, viz. That if the said Brainard should collect the excise in the town of Haddam, of which he was appointed a deputy collector by said Chapman; and should pay it over to said Chapman, who was a deputy collector for the county of Middlesex, or to his lawful successor; and should truly account for the same according to the laws of this state; then said bond was to be void.

And the defendants said, that said Chapman instituted a suit on book against said Brainard to the county court holden at Haddam, on the first Tuesday of April A. D. 1791, by writ dated the 22d of March A. D. 1791, demanding £100 damages; which action was appealed to the superior court, holden at Middletown on the last Tuesday of July A. D. 1791, and the plaintiff finding that he had misconceived his action, and that he could not bring in any sum which the said Brainard had collected for excise; it was agreed between said Chapman and said Brainard, that said Chapman should charge in his account all sums which he claimed that said Brainard had collected, and said Brainard would not object to the pro-

priety of the charges, but only to the justice of them ; and pursuant to said agreement, said Chapman charged on book all claims and demands for excise, which he might or could have made by the condition of said bond, and the same were considered and adjudicated upon by the superior court ; and said superior court gave judgment that the defendant owed the plaintiff nothing, but that the plaintiff was in arrear to the defendant £1-10—and thereupon that all said claims had been once considered and adjudged, and the defendants ought not to be further called in question for them.

The plaintiff replied, and admitted the bond had such a condition—also admitted the action by book, and judgment thereon ; yet he said that said deputy was appointed a collector of the excise in August A. D. 1785, and continued to act as such until January A. D. 1789 ; and made return to the plaintiff of the following sums by him collected viz. before October, 1785, £21-19-10 ; before July A. D. 1786, £43-19-1 ; before January, 1787, £17-17-3 ; before July, 1787, £24-3-3 ; before January, 1788, £19-13-3 ; before July, 1788, £17-11-4 ; before January, 1789, £22-5-10, as and for the whole which he had collected. And the plaintiff said that said sums were not the whole which the defendant had collected ; for that he had collected of James Knowles £8-10-6, of John Kelley £4-16-10, of James Child £5-4-5, of Uriah Kelsey £54-3 ; all which sums were secured to be paid before April A. D. 1790, and were not included in said return, which sums had never been paid or accounted for by said Brainard.

The defendants rejoined that the sum of £8-10-6, collected of J. Knowles, was omitted in said return by mistake ; and before said Brainard discovered it, the plaintiff had moved to Lebanon ; and before the impetration of the plaintiff's writ, he settled said accounts with the comptroller and paid the money to Andrew Kingsbury, Esq. treasurer ; and at Lebanon he tendered to the plaintiff six shillings which was his commission on said sum, and now offered the same

in court ; and averred that the sums alledged to be collected of Kelly, Childs, and Kelfy, he collected as deputy to Jonathan Bull, Esq. in 1784, before his appointment by the plaintiff, and traversed his having collected them under the plaintiff, as his deputy.

The plaintiff surrejoined—and joined the traverse, and affirmed that the defendant collected said excise of Kelly, Child and Kelfy, as his deputy—and demurred to the rest of the defendant's rejoinder—and judgment that the defendant's rejoinder was insufficient.

By the court—The judgment in the book debt action, if any bar at all, must be considered as a bar in one or the other of these two ways—either as a judgment in an action for the same cause, matter and thing—or as a satisfaction by the accord and agreement of the parties. As to the first, nothing can be clearer than that a judgment in an action of book debt is no bar to an action on bond. As to the second, it does not appear that there was any satisfaction ; for the judgment was the other way, in favor of the defendant. As to the payment made to the treasurer, if the payment was so made as to exonerate the plaintiff in his account so much, it will go in mitigation of damages ; but it is not a performance of the condition of the bond.

Savage *vers.* White.

ACTION of trespass, for breaking and entering a certain close of the plaintiff's—demanding £4 damages ; brought before a justice of the peace.

The defendant plead that he was not guilty—and judgment thereon.

The defendant appealed the cause to the county court, and from thence on the same plea said cause was appealed to the superior court ; and issue closed to the jury.

The agreement of parties may take away error, but cannot alter a positive statute and make a cause appealable which by law is not so.

MIDDLESEX COUNTY,

The jury were empaneled, and the declaration and pleadings read ; by which the court discovered that the cause was not appealable, and ordered it to be erased from the docket.

The parties agreed, if permitted by the court, that the defendant should alter his plea, and set up his title.

By the court —This will not help the matter, for the cause was not appealable in the county court, and this cannot make it so ; and though the agreement of parties in some cases will take away error, yet it cannot alter a positive statute.

Merriman vers. Biffel.

Recruiting officers have no right to enlist indented servants and apprentices into the army without the consent of their masters.

ACTION of the case, declaring that on the 1st of January A. D. 1794, one William Fisher, was the plaintiff's servant, bound to him by indenture until he should arrive to full age, which would have been on the 1st of Sept. A. D. 1796 ; and that he was entitled to his service as an apprentice until that time.

That the defendant not ignorant of the premises, but contriving to defraud the plaintiff and to deprive him wholly of the service of his servant aforesaid, did at said Middletown, on said 1st day of January, entice and procure the said William to depart and leave the service of the plaintiff, wholly against his mind and will ; and on the 1st day of February A. D. 1794, the plaintiff applied to the defendant for his said servant, shewed him the indentures by which he was entitled to his service, and demanded of him his said servant ; but the defendant refused to let the plaintiff have his said servant ; and from said 1st of January to this time, had continued him in the service of the defendant. And to prevent the plaintiff from taking his said servant, the defendant secreted him, and had sent him to parts unknown to the plaintiff, whereby the plaintiff had wholly lost his service.

Plea in bar—That the defendant was an ensign in the service of the United States ; that he was appoint-

ed to the recruiting service in the state of Connecticut, with instructions from the department of war, dated 10th July A. D. 1793, recites them, in which it was required that every recruit should be above eighteen and under forty-five years of age:—That while the defendant was upon said recruiting service at Middletown, the said William being above eighteen years of age and under forty-five, and every other way qualified according to said instructions, applied to the defendant to enlist as a soldier into the service of the United States, and the defendant finding him to be a suitable person for the purpose did on the 25th of January A. D. 1794, enlist him into the army of the United States to serve for the term of three years; and recites his enlistment; also the oath and certificate, dated the 1st of February A. D. 1794—and that said William thereupon received his bounty and clothes; and was holden as a soldier to serve in the army of the United States, and was under the orders of the defendant at said Middletown, until some time in the month of March 1794, when he proceeded to the state of New-Jersey by order of the defendant in his way to join the army north-west of the river Ohio—and said William having joined said army, was now a private soldier, in the army under the authority of the United States; and the plaintiff ought to be barred without that, that the defendant had procured said William to leave the service of the plaintiff, or had retained said William in his service, or had sent him to parts unknown to the plaintiff in any other way or manner, than was herein before stated in the defendant's plea in bar.

To this plea a demurrer was given. This cause was continued to advise—and at December superior court A. D. 1796, judgment was rendered, that the defendant's plea in bar was insufficient—and for the plaintiff to recover damages up to the time of the date of his writ for the loss of his apprentice's service.

In this case two questions were made—1st, Whether officers, recruiting for the army, had right by

law, to enlist indented servants and apprentices, under age, without the consent of their masters?—2d, Whether, if in case they did enlist indented servants and apprentices, they were liable to an action in favor of the master to recover damages for the loss of service?

By the court—There is no law that will justify recruiting officers, enlisting indented servants and apprentices under age, into the army, without their master's consent. The defendant being a recruiting officer, and acting for the public service, having the line of his duty marked out before him, like other public officers, acted at his peril, and must be answerable for damages caused by any misconduct of his. His being a public officer, cannot excuse or justify his violating the private rights of a citizen.

Danford Clark *vers.* John Ely.

When the statute of limitations is plead in bar of an action on a bail bond, the court admitted evidence to prove the day on which the judgment was actually entered up.

Twelve months in the statute of limitation are calendar months.

ACTION on a bail bond, given for the appearance of William Worthington, before the county court holden at Hartford, on the first Tuesday of November A. D. 1792, and answering to an action brought by Stephen Chester, Esq. against him—said bond dated the 14th of June A. D. 1792—writ dated 17th day of January, 1794.

Plea in bar—That said action was adjourned to the adjourned county court holden at said Hartford on the 3d Tuesday of January A. D. 1793, which was the 15th day of said month, and judgment was then rendered upon the default of said Worthington's appearing—And that more than twelve months had elapsed from the time of said judgment, to the date and impetration of the plaintiff's writ; and by the statute in such case made and provided, the plaintiff ought to be barred.

The plaintiff replied, that said action was continued in said January county court until the 24th day of said January, and then, and not before, judgment

was entered up against said Worthington in said action upon default.

The defendant traversed the reply of the plaintiff—And the parties joined issue to the court.

A question was made whether any evidence might be admitted to prove the day on which the judgment was rendered, besides the record.

By the court—Other evidence may be admitted to prove a fact which is not contrary to the record; this record is only of the day on which the court met. The plaintiff's writ was served on the 21st of January A. D. 1793, and it appeared by a cast made upon the note, and by the sum in the judgment, that interest was computed up to the 24th of January, and the execution was granted on the 25th of January.

In the case of *Allen vs. Cook*, determined at New-Haven, February A. D. 1773, upon a writ of error, dated the 27th January A. D. 1773. Cook plead in bar, the statute of limitation. The clerk of the court certified the day of the court on which the judgment was entered up; which was more than three years, and the plaintiff was barred. In this case, the court found that said action was continued in said adjourned court and judgment rendered on the 24th of January A. D. 1794, and for the plaintiff to recover. The court also determined that twelve months, mentioned in the statute, were calendar months.

George Roberts *vers.* The State Treasurer.

WRIT of error to reverse a judgment of the county court upon an information against the defendant; for that he said George Roberts, not being a magistrate or justice of the peace, nor ordained minister of the gospel, settled in any church or society within the county of Middlesex; did at Haddam in said county, on the 1st of December A. D. 1793, join together in marriage David Wilcox and Huldah Porter, both of said Had-

No minister has right to marry but such as are ordained ministers, and settled in the work of the ministry in some place in the state.

dam, contrary to the statute in such case made and provided.

The defendant plead in bar, that at the time of said transaction, he was an elder and deacon duly appointed and ordained at Tolland, on the 14th of August A. D. 1793, according to the rules and orders of the methodist episcopal church; and had right to perform divine service, administer the sacraments, and to celebrate marriages—That he had by the bishop, &c. committed to his care and charge the methodist episcopal church in Haddam, and the church in Middletown in said county of Middlesex; also the church in Derby and Watertown in the county of New-Haven, for the space of one year; that he resided one half of the time at said Haddam and one half at said Middletown; that he was dwelling at said Haddam, in the execution of his charge aforesaid at the time he married said couple.

The attorney for the state demurred to the plea in bar, and judgment that the plea in bar was insufficient—and that the defendant said George Roberts forfeit and pay the sum of £20 and the cost.

Error assigned was—that judgment ought to have been that said plea was sufficient.

Plea—nothing erroneous.

This cause was continued to advise—and at December superior court, A. D. 1796, the judgment of the county court was affirmed.

By the court—The regular and orderly celebration of marriages is of the highest importance to the public. It is clear that the defendant was not such an ordained minister, settled in the work of the ministry, at Haddam, or indeed, at any place within this state, as the statute contemplates and describes—he therefore had no right or authority by law to marry.

New-Haven County, July Term, A. D. 1796.

Dema Clark, a minor, by her guardian William Law.

APPEAL from an order of the court of probate. William Law was appointed her guardian until she arrived at the age of twelve years ; at which time she had a right herself to choose a guardian. She arrived to that age while this appeal was pending before this court ; and she made choice of — Parmele to be her guardian, who was appointed by the court of probate ; and he now exhibited a written motion to have his name entered on the record, as guardian to said Dema in the place of said Law, and to have the control of said cause.

A guardian to a minor appointed during the pendency of an appeal from probate, has right to have his name entered as guardian, and to have the management of the cause.

By the court—He is the only guardian of the person and the interest of said Dema—and the entry was made accordingly.

The Heirs of John Hall, by their mother and next friend *vers.* William Hall.

ACTION of ejectment for three pieces of land, described in the declaration.

Plea—No wrong or diffisin. Issue to the jury.

The defendant admitted himself to be in possession, and claimed title to the lands demanded.

The plaintiffs' title was by a deed from their grandfather, John Hall, to their father, John Hall, jun. in A. D. 1784, which contained the lands in question.

The facts in the case were, John Hall the elder, in A. D. 1770, gave a deed of seventy acres of land lying on the north side of his farm to his son Elias ; afterwards finding the boundary did not extend so far south as he expected, so as to include certain buildings, by reason of his farms being longer east and west than he imagined, he gave him another deed of

Where a father makes out deeds to his sons of their respective shares of his estate by way of settlement, and delivers them to a third person to hold, and to deliver over to the grantees to be recorded upon his decease ; a deed afterwards obtained from the father by one of the sons by fraud, of a part of one of

his brother's shares, and immediately recorded, will not hold against the first deed, altho' not recorded until after the father's death.

the same land in A. D. 1776, expressly forty rods in width, which extended about six rods further south than the first deed. He then gave a deed to his son William of seventy acres of land, and bounded him north on said Elias, to run the whole length of the lot and to extend so far south as to make seventy acres. In A. D. 1784, he undertook to settle his estate among his children; his lands he conveyed by deeds, and made a will of his personal estate. He gave by deed to William sundry pieces of land; and to John, father of the plaintiffs, he gave the lands in question, with other lands adjoining, and bounded him north upon William; which deeds being duly executed and acknowledged, he delivered into the hands of Esq. Peck, together with his will, with these instructions; that after his death they should be delivered to the respective grantees to be recorded; the grantees all being present and assented to it. Elias Hall and William Hall were bounded upon each other, and a division fence had been erected and kept up for many years upon the line between them; Elias sold his part to — Barns; and in A. D. 1793, John Hall, sen. having become old and much debilitated in body and mind, his son William, who lived with him, procured it to be represented to his father, that his farm was a mile and a quarter in length, instead of a mile only, as he had supposed—That in consequence of that, Elias's deed would not come so far south by six rods as was supposed, and as he was bounded north on Elias, it would carry his seventy acres further north, and leave out a valuable spring of water on the south, and some of the best of the land; and that John by means of this, would have a great deal more land than was intended by his father.—Upon this, said John, sen. sent for Esq. Peck and for said deeds—John, sen. took the deeds from Esq. Peck and made out a deed of a strip of land to said William, twenty rods wide, running the whole length of the farm lying south and adjoining north on said William's seventy acres; and which was contained in the deed of A. D. 1784 to his son John—William's last deed was dated 21st of June A. D. 1793, and was then re-

corded. The deed to his son John with the other deeds, after this, remained until his death; when Esq. Peck delivered them to the respective grantees to be recorded.

The defendant claimed the land on the ground that his deed was first upon record—and that the deed to the plaintiffs' father was revoked as to said twenty rods.

The plaintiffs to obviate this, contended that the deed to their father was not revocable, that it was made and executed when the grantees were all present, and by the consent of all parties—that all said deeds were delivered into the hands of said Peck with no other condition or reservation, but only that he should hold them, until after the death of the grantor, and then deliver them to the grantees. The right to have those deeds upon the death of the grantor, was an interest vested in the grantees, which neither the grantor nor any other could revoke without their consent. And the deeds being voluntary conveyances, could make no difference in this respect, as all were such. 1 Vern. 100, *Villers vs. Beaumont*, and *Bale vs. Newton*, 464.

2d, That said William knew of their father's deed and that it could not be recorded until after their grand-father was dead. It was a fraud in him under these circumstances, to get his deed recorded, and of which he could not take benefit. Besides his deed is only a voluntary conveyance and doth not come within the reason of the statute, which was to prevent bona fide purchasers for valuable consideration and creditors being defrauded; and further, that their father's deed was recorded within a reasonable time.

3d, This deed was obtained by fraud and imposition practised by William on their grand-father, of which he ought never to be permitted to take advantage, for the representations made in order to obtain it were not true.

D d d

Verdict for the plaintiffs and accepted by the court—and for these reasons—1st, The grand-father at the time he gave the last deed to William in A. D. 1793, was not capable of understanding what he did—2d, Said deed of the twenty rods, was obtained from him by fraud and imposition practised by said William—3d, The deed of A. D. 1784, vested the title to these lands in the plaintiffs' father to all intents as against the grantor and all parties privy to the same, and said William was with the other heirs privy and consenting to the same as a family settlement.

Rufus Fairbanks, one of the executors, legatee and creditor of John Albro.

A creditor may not be a commissioner on an insolvent estate.

APPEAL from the acceptance of a report of commissioners by the court of probate—Because Stephen Osborn one of the commissioners was a creditor to said Albro, and had a claim allowed him by the commissioners of 8/11.

The appellee replied that it was true said sum was allowed by the commissioners to said Osborn, yet he said there was due from him to said estate the sum of £2-8, on a different account.

The appellant demurred to the reply—and judgment, that the reasons for setting aside said report were sufficient; and that said reply was insufficient; and the judgment of the court of probate was disaffirmed.

In this case it was urged, that the appeal ought to have been taken from the order of court, appointing said commissioners; and the case wherein Doctor Johnson took an appeal for the like reason, as creditor to Amos Botsford's estate, was referred to, where it was so determined. But the later precedents are the other way. *Lyon vs. Lyon*, adjudged at Windham in A. D. 1795. In that case the commissioner's demand which was allowed was but 4/-and the appeal was taken from the acceptance of the report;

and that with the greatest propriety, for the proof of the commissioner's being a creditor is the return of the commissioners—and if he is a creditor he cannot be a commissioner to judge of the claims of the other creditors; and the return is void. See *Barker vs. Wales*, Root's Reports. 1 vol. 265.

Chittington *vers.* Fowler.

ACTION of the case, declaring that on the 28th of August, 1789, at the special instance and request of the defendant, the plaintiff let, loaned and delivered to the defendant a certain state note, signed by John Lawrence, Esq. Treasurer, for the sum of £82-15-9 lawful money, and on interest at six per cent.—the interest paid to the 1st of February A. D. 1789; and the defendant in consideration of the premises, on said 28th of August A. D. 1789, on the receipt of said note, assumed and promised the plaintiff to return to him £82-15-9 in state notes, of the same tenor and date, on demand, or pay all damages. Writ dated in A. D. 1795.

An agreement executed on one part, not within the statute against frauds and perjuries.

Plea in bar—That the promise laid in the declaration was made more than three years before the date and impetration of the plaintiff's writ; that there was no memorandum in writing made of it; and by the statute made to prevent frauds and perjuries, the plaintiff was barred. The plaintiff demurred to the defendant's plea in bar. And judgment—that the plea was insufficient.

By the court—This is a contract executed on one part; and the action is laid upon the obligation or promise that the law implies from the transaction. The loaning and delivering the security to the defendant on his request, raises an obligation upon the defendant to return the security, or others of the same kind and value; or to pay the damage, which is the value and the interest. The statute respects parol executory contracts and agreements which have not been in any part executed.

Theodosius Fowler, Isaac Brunson, &c. *vers.*
Alexander Macomb.

A party not compellable to join in a demurrer to parol testimony.

When a demurrer is joined to the evidence, the jury may assess the damages provisionally.

When the defendant by his plea in bar makes it necessary, the plaintiff in his replication may shew, that he has done what by the plea is made necessary to substantiate in a legal sense the averments in the declaration and shew his right to recover, and be no departure in pleading.

ACTION declaring upon a certain promissory writing, executed by John Pintard to the plaintiffs, and guaranteed by the defendant; which writing and guarantee were in the words following, viz. "No 63. New-York, 22d February, A. D. 1792. "On the 8th of Jan. next, I promise to receive from "Theodosius Fowler & Co. or order, twenty shares "of national bank-stock, and to pay to them or to "their order for the same at the rate of eighty-four "and three-quarters per cent. advance. John Pintard." And the defendant on said 22d of February, endorsed on said writing, "I guarantee the within on the part of said John Pintard. Alexander "Macomb." And that the plaintiffs on said 8th of January, and on all parts of said day, at said New-York, did offer and tender to said Pintard twenty shares in said national bank, with the necessary transfer thereof, agreeable to said contract, but neither the said Pintard, nor any other person for him, appeared to receive said shares or to pay for them; and that said Pintard is, and was then, and ever since hath been, a bankrupt; of all which, the defendant had been notified, and requested to pay the difference between the going price of said shares on said 8th of January, and the price contracted for, which was about fifty per cent. upon said shares; and that the defendant, his guarantee aforesaid not regarding had not kept and performed the same, or paid for said shares.

The defendant plead in bar, that by an act of Congress, the stockholders in the bank of the United States were a corporation; and the shares in said bank assignable and transferable according to the rules which should be instituted and established by the by-laws and ordinances of the same. That by a bye-law of said corporation, made and passed at Philadelphia on the 31st of October A. D. 1791, it was ordained among other things, that the bank should be open for

the transacting of business every day in the year, except Sundays, christmas and the 4th of July, during such hours as the board of directors should deem advisable. And it was further ordained, that the board of directors be empowered to fix and establish requisite, safe and convenient forms for transferring bank stock; and that said board of directors did on the 20th of December A. D. 1791, fix and establish, that all transfers or sales of bank stock or shares in said bank, should be made by the proprietors of such stock or share, in person, or by the agent or attorney of such proprietor, empowered and authorised for that purpose; and that transfers or sales should be made in the books of said bank, at the place where said bank should be kept and holden, and within the hours of doing business at said bank, on any day, Sundays christmas and 4th of July excepted.

And the defendant further plead, that the board of directors of said bank did on the 23d of December A. D. 1791, deem it advisable, and did direct, that the said bank should be open on all banking days, for the transacting of business, from nine o'clock in the morning until three o'clock in the afternoon; and said bank ever since the 31st of October A. D. 1791 had been kept and holden in the city of Philadelphia; and that the plaintiffs on said 8th of January, at said city of New-York, did offer to deliver to said John Pintard, and did tender to the said John twenty certificates from the cashier of said bank, that the persons respectively named in said certificates were proprietors at the date of said certificates, to the amount of twenty shares; and did at the same time offer and tender powers of attorney from the persons in said certificates mentioned, duly executed and acknowledged, agreeable to the bye-laws of said corporation, which did empower the said John Pintard to transfer to himself or any other person the shares in said certificates mentioned. And said Pintard did refuse to accept said certificates and powers; which offering and tendering of said certificates and powers to said Pintard, on said 8th of January, in said New-York,

was the same offering and tendering of said twenty shares to said Pintard on said 8th of Jan. in said N. York alledged in the plaintiffs' declaration—without that, that the plaintiffs on said 8th of January, and on all parts of said day at said New-York, offered and tendered to the said John Pintard twenty shares in the national bank, with the necessary transfer thereof as the plaintiffs in their declaration had alledged.

The plaintiffs replied, and admitted the tender of the certificates and power to have been made in New-York, as the defendant had alledged in his plea. Yet they said, that on the 8th day of said January, at the city of Philadelphia aforesaid, said Isaac Brunson for and in behalf of the plaintiffs, at said United States bank, and during all the hours of doing business on said day, at said bank, offered and tendered to the said John Pintard twenty shares of stock of the said bank, in compliance with said contract; and then and there during said period held the certificates of said shares from the cashier of said bank in his hands; and the said stock was then and there duly entered to his credit in the books of said bank; and at the uttermost convenient part of said day, and at the latest time before the bank was closed at night on said day, the said Isaac at said bank, offered and tendered said shares to the said John, and neither the said John nor any person in his behalf appeared to receive said stock or to comply with said contract; which said tendering and offering with the said offering and tendering mentioned in the defendant's plea, was the offering and tendering mentioned in the plaintiffs' declaration, without that, that the offering and tendering mentioned in the defendant's plea at New-York, was the offering and tendering mentioned in the plaintiffs' declaration.

The defendant rejoined, that on said 8th of January, at the United States bank in said Philadelphia and during all the hours of doing business on said day, at said bank, the said Isaac Brunson, for and in behalf of the plaintiffs, did not offer and tender to the said John Pintard, twenty shares of stock of the said

Stranger!!

bank; and that at the the uttermost convenient part of said day, and at the latest time before the bank was closed at night on said day, the said Isaac did not at said bank, offer and tender said twenty shares to the said Pintard in manner and form, &c. upon which, issue was closed to the jury.

The plaintiffs produced the deposition of Edward Fox, notary public, which was read, and was all the evidence produced by the plaintiffs. The defendant read a deposition of said Fox's taken by him, and then offered to demur to the evidence, and moved that the plaintiffs be ordered to join in the demurrer; and that the jury assess the damages provisionally.

Which demurrer and motion were as follows, viz. That the plaintiffs produced in support of said issue, and gave in evidence, that on said 8th day of January A. D. 1793, Edward Fox, notary public, did go with said Isaac Brunson, one of the plaintiffs, and at the request of said Isaac, to the bank of the United States in said Philadelphia, in the plea of the defendant mentioned, and did with the said Isaac Brunson, inquire at said bank, and of the clerks of the transfers, for said John Pintard and said Alexander Macomb, in order to transfer to them forty shares of stock of the said bank, agreeably to, and in fulfilment of the contract mentioned in the plaintiffs' declaration, and of another contract of the same tenor and date; and that the said Isaac Brunson, did then and there offer and tender the said forty shares, and declared himself ready to transfer the same, to either the said Pintard or said Alexander Macomb; and that the said Isaac remained there, and held in his hands said certificates of the said forty shares of stock; and that the same were duly entered to the said Isaac's credit in the books of the said bank; and that neither the said John Pintard nor Alexander Macomb, or any person in their behalf appeared to receive the said shares, or pay for the same; and that he said Fox, with the said Brunson waited at the said bank till the same was shut up at night, and thereupon did require that said jurors should find said issue for the plaintiffs; and

the defendant by his counsel, said that said evidence and allegations aforesaid were not sufficient in law to maintain said issue for the plaintiffs, and to which the defendant needed not, nor was he holden to give any answer for default of sufficient evidence in that behalf—and demanded judgment that the jurors aforesaid of giving their verdict might be discharged.

And the defendant, by his counsel, also moved that the plaintiffs be ordered to join the demurrer and that the jury provisionally assess the damages.

It was further agreed, that if the court did not order the plaintiffs to join the demurrer ; that verdict should be entered for the plaintiffs as though found by the jury.

The court were of opinion that it was not competent for the defendant in this case in this stage of it, to demur to the evidence ; for the following reasons, viz.—It is the province of the court to make the inferences of law from the facts—but inferences of facts from the evidence stated and admitted, it is the province of the jury to make.—The issue in this case is special, that said Isaac at the bank aforesaid, on said 8th day, did offer and tender said twenty shares and continued at said bank during all the hours of doing business at said bank on said days, and did at the uttermost convenient part of said day, and at the latest time before said bank was closed at night of said day, offer and tender said twenty shares, &c. Now whether the said Isaac offered and tendered said shares at the latest time of said day before said bank was closed, is a fact, and a very material fact, which the jury may infer from the evidence admitted ; but the court cannot, any more than they can infer a conversion in trover from the evidence of a demand and refusal.

Further, the evidence is parol, to which a party is not compellable to join in a demurrer ; and this demurrer, was not offered, until after the defendant had given in evidence the deposition of said Fox on his part ; whereas the demurrer ought to have been

taken to the plaintiffs' evidence before the defendant had produced any. The jury assessed the damages at £ and verdict was entered for the plaintiffs in the words of the issue—and the defendant moved for judgment in his favor, said verdict notwithstanding; for the following reasons, viz. That by the laws and regulations of the bank of the United States, alledged and admitted in the defendant's plea, all transfers of shares of bank stock, must be made in the books at the bank; consequently all tenders of shares must be made there. That the plaintiff in his declaration having alledged a tender made in New-York only; where said shares could not be transferred—and the defendant in his plea having specially set forth, what that tender was; that it was of certificates of twenty shares with powers of attorney to the said Pintard to transfer said shares to himself, or any other person; and then traversed the tender as alledged in the declaration. The plaintiffs in their reply admitted the tender in New-York, to have been made as the defendant in his plea had stated; yet that they also made a tender at said bank in Philadelphia—and set it forth; which was denied by the defendant, and found to be true by the verdict of the jury. That the plaintiffs by their replication could not help out a defective declaration, by setting up a tender to have been made at another place, and this was clearly a departure in pleading.

For the plaintiffs it was insisted, that upon the whole record the plaintiffs were entitled to judgment; and that a plaintiff might aid his declaration by his replication, and be no departure. Further, that the tender made in New-York, and admitted by the pleadings, was sufficient to entitle the plaintiffs to judgment; for a tender of the certificates to said Pintard, with a power from the proprietors of them to transfer them at the bank to himself or any other, was a substantial compliance with the contract. This case was continued to advise, and was again argued:

For the defendant it was contended that the tender could be made only at the bank in Philadelphia. 1 Salk. 622 ; 3 Salk. 324 ; 1 Ld. Raymond, 686 ; 1 Str. 504, 533, and 579 ; 2 Str. 777 and 882. A tender can be good only where the transfer could be made.

Secondly, that the tender at the bank in Philadelphia, set forth in the plaintiffs' replication and found by the verdict, was a departure from the declaration ; and did not serve to fortify the tender alleged in the declaration ; and that the departure was fatal upon a motion in arrest. 4 Bacon, 125 ; Cro. Cha. 228, and 2 Mod. 31. And to shew that the day in an action on a parol promise was immaterial, 1 Str. 22, Cole *vs.* Hawkins ; and that on a note it was material, 2 Str. 806, Mathews *vs.* Spicer ; and that a departure in a material point was fatal on a general demurrer, or on a motion in arrest after verdict, 4 Durnford, 504, Niblet *vs.* Smith ; 3 Black. Com. 3d page were quoted.

For the plaintiffs it was said, that the declaration stated a tender to have been made to Pintard, in New-York ; the replication alleged also a tender made in Philadelphia—And in personal contracts, the place was not material, unless made so by the contract, or by the defendant's plea, which was this case ; and the plaintiff may show in his reply a tender made also where the defendant had said in his plea it ought to have been made ; 2 Str. 806 ; 1 Str. 21 ; 1 Salk. 222 ; 1 Levin. 110.

2d, If it was a departure, no advantage can be taken of it after a verdict ; for upon the whole record it appeared that the plaintiffs were entitled to recover ; and the doubt only arose from an irregularity in the pleading, which could be taken advantage of only by a special demurrer. Thos. Raym. 86 ; 1 Keb. 566 ; 1 Str. 22 ; Comyns Digest, vol. 5, page 436.

3d, The act of Congress authorized the directors to form rules for transferring of stock, but not to fix the place where it was to be done.

Judgment, July Term, 1797, upon a re-argument—that the motion of the defendant for judgment, said verdict notwithstanding, was insufficient, and that judgment be entered up for the plaintiff to recover.

By the court—The contract is, that said Pintard will receive of the plaintiffs on the 8th of January, 1793, twenty shares of national bank stock; and pay to the plaintiffs, or their order for the same, at the rate of eighty-four and three-quarters per cent. advance.

There is no place set in the contract where the shares would be received, of consequence no place where the plaintiffs should deliver or tender them.—The delivery or tender therefore must be made to Pintard in person, or to his order, be he where he would within the United States. The averment in the declaration is, that the plaintiffs did on said 8th of January, and on all parts of said day, offer and tender to said Pintard, at said New-York, twenty shares in said national bank, with the necessary transfers thereof, agreeable to said contract.

*They could also
be rec'd at the
Bank, a transfer
could not be
made there.*

By the laws of Congress and the rules and regulations of the bank made under the authority of Congress, set forth in the defendant's plea, transfers could be made only in the books at the bank, which was kept at Philadelphia, and by the contract, payment or tender of the shares must be made to Pintard in person, who was in New-York. Now what was necessary to perfect a good tender in this case, in compliance with the contract, and the laws of the bank?—It was necessary that the plaintiffs should do every thing they could to invest Pintard with the property in the shares, and to put it in his power to receive them; and in order to that, it was necessary that the transfer and tender should be made at the bank, and also, a tender to said Pintard in person, wherever he might be, if within the U. States; less would not have answered, and more they could not do; and all this is comprised in the averment in the declaration—that they made a tender to said Pintard, with the necessary transfers.

The defendant's plea states precisely what the plaintiffs did at New-York; and then shews by the law of the bank, that was not doing enough to complete a tender. The plaintiffs admit they did at New-York, what the defendant said they did, yet that they also at the bank in Philadelphia, offered and tendered said twenty shares to said Pintard, duly in the books of said bank, to be passed to his credit, but nobody appeared to receive or pay for them. This is no departure, but shewing that they had substantially and legally done, what by the contract and the laws of the bank they were obliged to do; and what in their declaration they averred they had done, viz. that they offered and tendered at New-York, twenty shares to said Pintard with the necessary transfers thereof;—which by the whole of the pleadings, could no otherwise be done, than by making a tender of them personally to Pintard; and also, by offering and tendering a transfer of them at the bank:—Nor was it necessary for the plaintiffs to say any more than they have in their declaration; until the defendant by his plea had shewn, that by the law of Congress and the regulations of the bank, it was necessary that a tender at the bank, to transfer said shares in the books of the bank, should be made.

The plaintiffs in their replication, set forth that they had done this; which shewed, that the tender alleged in the declaration to have been made to Pintard, was a complete and perfect tender, and is so far from being a departure, that it fortifies the declaration. The allegations in the declaration are, that the plaintiffs had done every thing requisite to make the tender to Pintard, a good and legal tender. And the plea in bar, made it necessary for the plaintiffs in their replication to set forth specially what they had done at the bank in Philadelphia, as well as at New-York, to shew that the allegation in the declaration was substantially and legally just and true, and that they had done every thing necessary by the contract, and by the laws and regulations of the bank, to entitle them to recover.

*It says, how does it justify, otherwise
 that by departing and making a just man-
 -ifest to the court of action, which alone
 is taken in the declaration.*

This judgment was afterwards affirmed in the supreme court of errors.

Writ of Habeas Corpus and Discharge

Hills *vers.* Watts Hubbard.

ACTION of ejectment for land, described in the declaration.

Plea—No wrong or disseisin. Issue to the jury.

The plaintiff's title was the levy of an execution against the defendant, made in February A. D. 1794. The defendant set up title under Jedidiah Norton; who attached said lands in November 1793, recovered judgment in February A. D. 1795, and levied said execution in June A. D. 1795. Said Norton conveyed said land to Merriman, under whom the defendant held. The plaintiff offered to prove that said Norton had attached much more land than was sufficient to answer and pay his debt, and that before he levied his execution, the plaintiff applied to Capt. Wright, to whom said Norton's debt was assigned, whose interest it was, and who had the power of control over said debt, and said attachment, to obtain his consent to levy his, the plaintiff's, execution upon some parts of the lands attached by said Norton; as the attachment covered enough to satisfy both their debts. Upon which said Wright consented and agreed that he might levy his execution upon the land described in the declaration, and satisfy it; and that he, said Wright, when he got judgment and execution, would not levy upon said land, but upon other parts of the lands attached; that said Wright went and declared to the officer and the appraisers, who set off said land to the plaintiff, when they were entering upon said business; that he consented to it, and had relinquished all right he had by virtue of said attachment in Norton's name, to the land levied upon by the plaintiff. This was objected to, on the ground that it was an agreement concerning land, not reduced to writing. The evidence was admitted.

A creditor who has consented that another may levy upon a part of the lands he has attached, may not afterwards take them away—and if he doth, it is a fraud and may be proved by parol testimony.

By the court—The plaintiff does not claim the land upon the score of the agreement merely, but upon the ground of fraud ; said Wright having induced the plaintiff to levy upon this land, by telling him he might, and that he would not take it from him ; and after he had levied, to attempt it, would be a gross fraud ; he is therefore stopped by his own act from claiming it—for no man may take advantage of his own wrong to injure another. It appeared that Wright sold this debt when in execution to said Merriman, who bought it at the request of the defendant ; and that said Wright informed said Merriman of his agreement with the plaintiff ; and said Hubbard was also made acquainted with it ; and that the whole was contrived between the defendant and said Merriman, in order to defeat the plaintiff of his title, without the approbation of said Wright. Verdict and judgment was for the plaintiff to recover.

It was objected on the trial of this case by the defendant, that the plaintiff's remedy, if he had any, was in chancery—and not at law. But the court were clearly of opinion that fraud would destroy or defeat a title at law, as well as in equity.

Executors of Sheldon Clark *vers.* Timothy Higgins.

Where executors pursue an action commenced by their testator, and the defendant recovers, they are liable for the cost out of their own estates.

ACTION on book, commenced and prosecuted by said Sheldon in his life time. Pending the suit he died. His executors entered and pursued said action.

The defendant plead that he owed the deceased nothing by book. Issue to the jury.

The jury found that the defendant did not owe the deceased ; but that the deceased was indebted to him at the time of his death £1-17, which they found for the defendant to recover with his cost.

The defendant moved to have execution against the executors for the cost, to be levied upon their own

proper goods. And the court gave judgment accordingly, that the execution issue against the executors, for the cost, of their own proper goods.

Miller and Whitney *vers.* Hall, &c.

ACTION of book debt, brought to the city court, in the city of New-Haven—alludging that the cause of action arose within said city, and describing one of the plaintiffs, viz. Whitney, as belonging to said city, the other plaintiff and both of the defendants were described as belonging to places out of said city.

If one of the plaintiffs only lives within the limits of the city, it will entitle the city court to jurisdiction.

The defendants plead in abatement, that neither of the defendants, and but one of the plaintiffs belonged and dwelt within said city; and by the act of incorporation constituting said city court, one of the parties must belong to said city in order to entitle the city court to jurisdiction.

Judgment—Plea insufficient.

By the court—The law regulating civil actions, is, that all personal actions which shall be brought before the county and superior courts, shall be brought in the county where the plaintiff or defendant dwells. An action brought to the county court, in the county where one of the plaintiffs dwells, there being more plaintiffs than one, has been considered and adjudged to be within the statute to entitle the court to jurisdiction, though the defendant lived out of the county.

See. Int. Jurisdiction.

John Beardly *vers.* Isaac Foot and Son.

INFORMATION quitam on the statute for a secret assault. Issue to the jury.

Evidence admitted to prove a witness to be an atheist.

After the plaintiff had been sworn and testified; the defendant offered to prove by witnesses, that the plaintiff was an atheist, who denied the being of a God, the doctrine of the trinity, and the truth of divine revelation.

NEW-HAVEN COUNTY,

The court allowed proof of the first, viz. his denial of the being of a God. See the case of Bow vs. Sheriff Parsons, 1 vol. Root's Reports, 480.

Robert Townsend, &c. *vers.* George Phillips; &c.

In case of a total loss, the insured may abandon.

An abandonment is necessary where the assured demand for a total loss.

ACTION on a policy of insurance, declaring that on the 5th of December A. D. 1793, the plaintiffs were owners of the brigantine, called the Polly, lying in the harbor of New-Haven, loaded and bound to sea, Amos Townsend master—that the defendants then and there for the consideration of one per cent. per month on £900, being the value of said brigantine, to be paid them, made and executed their certain writing or policy of insurance to the plaintiffs, signed, &c. whereupon and whereby, the defendants for the consideration aforesaid, insured £900 lawful money upon said brigantine, tackle, apparel, ordnance, &c. from the 2d day of said December for the term of six months, then next ensuing, in port and at sea; taking upon themselves the peril of the seas, men of war, fire, enemies, pirates, rovers, thieves, letters of mart and counter mart, surprisals, takings at sea, barratry of the master and mariners; and all other perils, losses and misfortunes, that had or should come to said brigantine and appurtenances; and that in case of loss no deduction should be made from the sum assured, except two and a half per cent. and that the money should be paid in three months after affidavit, or other proof of loss, and proof of interest; provided said loss should amount to £5 per centum. And that afterwards on the 20th of said December, the defendants by a certain writing at the foot of said policy signed, &c. for the consideration of the additional premium of one per cent. assured by the plaintiffs on said sum of £900, agreed to take on them the risk and did insure against all captures at sea, by any of the powers at war, or others, on said brigantine, &c. for said period of six months.—That on the 25th of December said brigantine pro-

ceeded on her voyage, and on the 24th of January 1794, being in the course of her destination from Martinico to Guadaloupe, was captured forcibly, unjustly, and piratically, contrary to the will of said master, by the British schooner Experiment, Daniel Morgan, captain, and carried into the island of Montserrat, in the dominion of the king of Great-Britain; and there lost entirely to the plaintiffs—the master being unable to reclaim the brigantine or any part thereof; against which the said master protested in said island of Montserrat; and on the 1st of April, 1794, did make affidavit and protest at New-Haven before E. Goodrich, Esq. notary public. Of which capture, loss, affidavit and protest, the defendants at said Middletown, on or about the 1st of May, were fully notified, and proof of said interest, in due form of law made—That thereupon by the custom of merchants the defendants on the 1st of August 1794, became liable to pay, and in consideration thereof, assumed and promised.

Plea—non assumpsit. Issue to the jury—who in a special verdict, found the following facts, viz.

“ In this case, the jury find—that on the 2d of
 “ December 1793, and until the capture and condemnation herein after mentioned, the plaintiffs
 “ were the sole owners of the said brigantine, in the
 “ plaintiffs’ declaration mentioned; and that on the
 “ 5th day of December 1793, the plaintiffs did cause
 “ a partial insurance to be made on said brigantine,
 “ not to the full value thereof, but to the amount of
 “ £900 lawful money; and that the defendants did
 “ on that day make insurance upon said brigantine
 “ to that amount, by a regular policy of insurance,
 “ by the defendants subscribed, which said policy
 “ was and is in the words following, viz. (The policy
 “ is recited as set forth in the declaration.) And that
 “ the defendants did afterwards, viz. on the 20th of
 “ said December, make a further clause to said policy,
 “ by and at the request of the plaintiffs; in the
 “ words following, viz. New-Haven, December 20th;

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NEW-HAVEN COUNTY,

" 1793, it is since agreed, that the insurers take the
 " risk of captures, but in case of capture, the insurers
 " do not pay any expence that may arise in conse-
 " quence of capture, if afterwards released, unless it
 " happens by the dangers of the seas, for the addi-
 " tional premium of one per cent. Which clause
 " was then subscribed by the defendants.—The jury
 " further find, that on or about the 20th of said Decem-
 " ber, 1793, said brigantine did proceed from the port
 " of New-Haven to the West-Indies, with a cargo of
 " American property, (having no contraband goods
 " on board) and having no other property, and
 " bound to the island of Dominico; that said brig-
 " antine touched at the island of Martinico in said
 " West-Indies, a French island, and then in the pos-
 " session of the Republic of France; and there sold a
 " part of her cargo, and on or about the 21st day of
 " January 1794, sailed from said Martinico, for the
 " island of Guadaloupe, not having taken on board
 " at any time, previous to said sailing from said Mar-
 " tinico, any other property than money, which was
 " the sole and absolute property of the plaintiffs; nor
 " having on board any man or person, but citizens of
 " the United States of America; and on the 25th
 " day of said January, the said brigantine being near
 " the island of Guadaloupe in said West-Indies, and
 " bound to St. Ann's, a port in said island; which
 " island is, and then was an island belonging to and
 " in the possession of the French Republic, was cap-
 " tured by a privateer schooner, commissioned by
 " the king of Great Britain, to cruise against the en-
 " emies of said king, and was by said privateer forc-
 " bly and against the mind and will of the master
 " of said brigantine, carried into the island of Mont-
 " serat; and said island then was and ever since has
 " been owned and possessed by the king of Great Bri-
 " tain. And the jury further find, that the said brig-
 " antine was by the captain and crew of said priva-
 " teer libelled before the prize court of admiralty of
 " said island, instituted and established by said king,
 " and was by said prize court condemned as lawful
 " prize to said libellants:

" And the jury further find that neither the plain-
 " tiffs or the captain of said brigantine, or either of
 " them, nor any person in behalf of them ; or the
 " master of said brigantine, or either of them, ever
 " put in any claim before said prize court for said
 " brigantine, and that neither the plaintiffs, or the
 " captain, or the master had either money, friends or
 " correspondents, to enable them to do the same—
 " and the jury further find that by means of the pre-
 " mises, said brigantine was totally lost to the plain-
 " tiffs—and the jury further find that one Amos
 " Townsend, was at the time of said capture, master
 " or commander of said brigantine, and that he did
 " in due time, and in due form, make all the necessary
 " and accustomed protests in such cases ; and that
 " the plaintiffs seasonably and in due time, gave no-
 " tice to the defendants of all the facts aforesaid, and
 " made due proof of loss and interest to the defend-
 " ants according to the terms of said policy ; and de-
 " manded of them the sum of £900, insured by said
 " policy. And the jury find, that upon the exhibition
 " of said proofs of the capture and loss aforesaid, to
 " the defendants, they did acknowledge the said proofs
 " to be complete, and thereupon, paid to the plaintiffs
 " on or about the 1st of August 1794, £200 lawful
 " money, in part of said sum insured on said brigan-
 " tine and towards said loss. The jury further find
 " that on and ever since said 5th of December 1793,
 " there hath been war between the king of Great
 " Britain and the Republic of France. Now if the
 " law be so upon the facts aforesaid, that the plain-
 " tiffs are entitled to recover on said policy of insu-
 " rance ; then we find that the defendants did assume
 " and promise, &c. and that the plaintiffs recover
 " £783-12-9 lawful money, damages and cost. But
 " if the law be otherwise, then the jury find that the
 " defendants did not assume and promise, &c. and
 " find for them their cost."

There not being time for the special verdict to be
 argued, the cause was continued.

This case was argued in January A. D. 1797, and continued to advise—and at the superior court, July term 1797, was reargued, and judgment, that the law was so upon the facts found in the special verdict, that the plaintiffs were not entitled to recover on said policy of insurance, and that the defendants recover their cost.

By the court—Although the policy is an indemnity and stipulates against captures of this nature, yet if the capture and condemnation be contrary to the law of nations, and without any fault in the owners, master or mariners, the property cannot be considered as finally lost to the owners; for they may call upon the government of the United States, to make demand and to obtain satisfaction, from the government of Great Britain, whose subjects have committed the injury, in violation of the laws and rights of neutrality; or to make the reparation themselves, for not protecting the owners in their just rights; or for not obtaining redress for them from those, who have injured them.

By the capture and condemnation, the owners were totally, though, it may be not finally, deprived of their property; they had right therefore to abandon all their claim to the insurers and to make demand as for a total loss; but without such an abandonment, or proof that their property was totally, finally and irretrievably lost; as that it was consumed by fire, or sunk in the ocean, or the like, they may not recover for a total loss, as was demanded in this case. If it were otherwise, in this stage of the business, it could not be known what the average loss to the owners is, or would be, or whether any thing or not—for these reasons the court were clearly of opinion the plaintiffs were not entitled to recover. See *Mills v. Fletcher, Douglass, 219*, where the owners may abandon and go for a total loss. 1 *Durn. &c. 608*, *Mitchel v. Edy*, and 6 *Durn. &c. 422*, and *Espen. Rep. 293*.

Shipman verf. Miller, &c.

ACTION of the case upon a protested bill of exchange, drawn in Jamaica, in the West-Indies, upon a merchant in London.

In assessing damages upon a foreign bill of exchange which is protested, the court will inquire as to the custom of the place where the bill was drawn.

The defendants were defaulted, and were heard in damages. The court inquired what rule of damages had been adopted in Jamaica, where the bill was drawn, and found it to be twenty per cent. and assessed the damages at twenty per cent. and the interest on the bill from the time of its being returned and presented to the drawers.

Shipman verf. Miller, &c.

SPECIAL action of indebitatus assumpsit, for £95 Jamaica currency, had and received for the plaintiff's use.

Interest allowed in damages in an action of indebitatus assumpsit for money retained through mistake.

The case was, the plaintiff's vessel was taken and carried into Jamaica, libelled and cleared. The defendants were bondsmen for the claimant, captain Morris, who claimed for the owners. The judges fees were £75, and the registers were £70, which captain Morris paid; the defendants not knowing that he had paid them, and supposing they were liable for them, detained of the monies of the plaintiff's in their hands to that amount.

The case was defaulted, and upon a hearing in damages, the court allowed interest from the time of their receiving the money.

Fairfield County, August Term, A. D. 1796.

James Simons, &c. *vers.* Samuel and Benjamin Payne.

A defendant allowed to amend his plea while the case was on trial to the jury.

A witness shall not be privileged from testifying who has made himself interested, after the party was interested in his testimony—but what came to his knowledge after he became interested he cannot be compelled to disclose.

ACTION of debt on book, demanding £35 lawful money.

The defendants plead in bar, that having prayed oyer of the plaintiffs' book, the same consisted of the following articles, and recited them, amounting to £32 lawful money; and that on the 14th day of April A. D. 1792, they tendered to Matthew B. Whittlesey, Esq. attorney to the plaintiffs, £25 lawful money, in full of debt and cost to that time.

The plaintiffs traversed Matthew B. Whittlesey's being their attorney, and said sums being in full of said debt. Issue to the jury.

In the trial, it was observed, that the defendants had not averred in their plea in bar, that the sum tendered, was in fact, in full of the debt and cost, but only that they tendered it in full.

The defendants moved for liberty to amend their plea—and the court gave them liberty to amend their plea. The defendants then moved, that Matthew B. Whittlesey, who was attorney to the plaintiffs, and who gave bond for the prosecution of said action, at the praying out of the writ, the plaintiffs being inhabitants of the state of New-York, and to whom afterwards the tender was made of the debt and cost, set up in the plea in bar, be admitted as a witness.

To which the plaintiffs objected, on the ground of his interest as bondsman aforesaid. By the court—The plaintiffs cannot object, for it is against the witnesses interest to testify for the defendants—upon which the bondsman claimed it as a matter of right, that he was not compellable to testify against his interest, as he was bondsman, he stood in the same predicament with the party, who clearly was not com-

pellable to give evidence against himself. The defendants urged that his giving of the bond was voluntary ; and that the defendants were interested in his testimony, and his making himself interested could not deprive them of the benefit of his testimony.

By the court—The parties have an interest in the testimony of the witnesses, and a witness by his own voluntary act, shall not deprive them of it. But where a person becomes interested by giving bond for a party, and afterwards matters come to his knowledge, which would be beneficial to the other party, for him to testify, he is not compellable to give this evidence, and thereby expose himself to be subjected on his bond.

Joshua Bailey, &c. *vers.* Elisha Nickols.

ACTION of the case, declaring that on the 15th of January, 1794, the plaintiffs wanted to purchase a quantity of barrel beef to send to the West-Indies. That the defendant applied to them and offered to sell them forty barrels of good cargo beef, well packed and salted, marked and branded with A. Sherman, the inspector's name upon it, and in all respects as the law required for exportation, at the price of 8 dollars per barrel ; and the defendant to induce the plaintiffs to purchase said beef, did affirm, declare and warrant said beef to be good cargo beef, well packed and salted, as the law required. That the plaintiffs, relying thereon, did buy said beef at said price. That said beef was not good, nor well packed and salted ; by reason whereof, said beef when it arrived in the West-Indies in the month of March next after, was corrupted and spoiled, and was lost to the plaintiffs ; of all which the defendant knew, and the plaintiffs were ignorant, at the time of said purchase.

The law implies a warranty that the thing sold is what it is held out to be—and if it is not, the seller must make good the damage, whether he knew of any defect or not.

L. J. R.
p. 52
W. J.
p. 54 + 314
448

The defendant plead not guilty. Issue to the jury.

In this case there was no dispute about the facts ; the plaintiffs bought the beef for exportation ; the de-

FAIRFIELD COUNTY,

defendant sold it to them for good cargo beef, marked and branded with A. Sherman, the inspector's name, as the law required, for 8 dollars per barrel : the beef when exposed for sale in the West-Indies, in the beginning of April following, was tainted and so bad that it could not be sold—the other beef shipped in the same cargo, was well preserved, sweet and good. It appeared also that the defendant, when he sold said beef, had no knowledge of its being otherwise than good ; it was put up by A. Sherman, a sworn packer in Newtown, who swore that he put nineteen quarts of salt and four ounces of saltpetre in each barrel ; that he first threw the beef into pickle to take out the blood, made of four quarts of salt to a barrel ; and after about four days he took it out and packed it down. That he took the pickle the beef was first put into, boiled it over, and skimmed it ; then he poured it warm into the beef. This method had not been before practised by this packer, but he thought it would preserve the meat better.

There was no doubt about the beef's being tainted, and scarcely a doubt but that the pouring the pickle warm into it was the cause of its being tainted.

Upon this state of facts, two questions arose ; 1st, whether this action was maintainable upon the implied warranty, as no express warranty was proved to be made ; and 2d, whether the defendant could be liable upon an implied warranty for selling beef for exportation, which was packed by the sworn packer, inspected and marked by him as the law directed, although it should be bad, unless it was proved that he knew it to be bad.

The jury brought in their verdict that the defendant was not guilty. The court unanimously dissented from the verdict, and in giving their opinion to the jury, resolved the following points, viz. That the defendant, by selling this beef for cargo beef and asking and receiving a sound price for it, did warrant it to be such as the law described, under the denomination of cargo beef, and that it was sound and good ;

and it not being such, he was liable to respond in damages, although he was ignorant of its being defective. 2dly, That the object of the legislature in requiring pork and beef to be sorted, well packed and salted for exportation, was to raise its credit abroad, increase the demand for it, and to preserve the health of mankind from being injured by corrupted provisions. The regulations which the law has prescribed, to secure its being well done, and to prevent any defect or imposition in the business, can never be considered as a protection, or indemnification, for not doing it well; nor affect contracts entered into between the parties relative to said articles—they stand upon the same principles they did before, and are controllable by the same rules.

The jury upon second consideration, brought in a verdict for the plaintiffs to recover, which verdict the court accepted.

Michael Lockwood, administrator of Jabez Lockwood, deceased *vers.* Gideon Lockwood.

PETITION in chancery, shewing that said Jabez's estate was insolvent; and that said Jabez in his life time, on the 6th of May A. D. 1762, mortgaged certain lands to John R. Myer, defeasable by paying a note for £106 New-York money, by the 6th of May A. D. 1763, with the interest.—That on the 10th day of August A. D. 1767, said Jabez paid £53-13-4, in part of said debt, and died in September 1778. That the petitioner took administration on his estate; and that said John R. Myer sold and assigned said mortgaged premises to Silliman Andrus in A. D. 1780—and that said Andrus on the 15th of February A. D. 1794, sold and assigned the same to said Gideon Lockwood, and that said Gideon had held the possession and improvement of said mortgaged premises ever since April A. D. 1780, which were worth £180, and would more than pay said

The right of administrators to interfere with real estate, is for the benefit of creditors.

FAIRFIELD COUNTY, &c.

debt and interest—Praying that said Gideon might be compelled to release back said land, and to pay the balance of the rents, &c. after paying said debt and interest.

The respondent admitted said Jabez's estate to have been represented insolvent, that he was the assignee of said mortgaged estate, for which he gave £66. That he purchased it in February A. D. 1794, but that he had purchased of all the creditors of said Jabez their debts, and taken an assignment of them, which amounted to a much greater sum than the value of the mortgaged premises.

By the petitioner it was answered, that the said Gideon must be allowed what he had actually paid, for the debts he had purchased, and no more ; and that all over the sum he paid should inure to the benefit of the other creditors, if any, if not, to the heirs.

The respondent claimed to have purchased up all the debts against said Jabez. A doubt remained in the minds of the court with respect to some of the debts, and the cause was continued.

At the superior court holden on the 3d Tuesday of January A. D. 1797, Gideon Lockwood, produced assignments from all the creditors of said Jabez, of their debts to said Gideon, therein acknowledging they had received their pay of him in full ; upon which the court dismissed the petition without cost, on the ground, that as the creditors were all satisfied, the administrator had no right to pursue this petition in behalf of the heirs.

Litchfield County, August Term, A. D. 1796.

Thomas Bird *vers.* Isaac Bird.

ERROR to reverse a judgment of justices Hale and Norton in a prosecution for a forcible entry and detainer brought by said Isaac *w.* said Thomas, complaining to said justices—said justice Hale being *unus quorum*, that said Thomas did on the 8th day of April A. D. 1796, with force and arms, viz. with violence and strong hand, enter into a certain messuage or parcel of land in Salisbury, bounded and described in said complaint, of which the said Isaac was peaceably possessed—and did with force, violence and strong hand, deforce, dispossess and remove the said Isaac therefrom; and with like force and violence continued to deforce, hold and detain said premises from the said Isaac; and praying for a remedy agreeably to the statute in such case made and provided.

The answer of a court, to a motion in arrest, containing questions of fact and of law, that the motion is overruled, is too vague, and is a ground of error.

Upon a reversal of a judgment in a process on the statute of forcible entry and detainer, the court will not order a restitution of the possession.

Upon which complaint said justices issued a warrant to arrest said Thomas and him to have forthwith before said justices to answer to said complaint.

The said Thomas being taken, a summons was granted to summon eighteen sufficient and indifferent freeholders, dwelling near said place, to appear at the dwelling house of said Isaac Bird, to serve as jurors on said complaint. And the said jurors being empaneled and sworn, the said Thomas plead that he was not guilty—upon which issue was closed to the jury; and the evidence being taken and the parties heard thereon; the cause was committed to the jury, who brought in their verdict that the defendant was guilty.

The said Thomas then moved in arrest of judgment for the following reasons—1st, That said Isaac provided a dinner for said jury, while attending upon said trial, at his own expense, and for which he received no pay—2d, That Timothy Chittington, the officer who summoned said jury and attended said trial, was cousin by marriage to said Isaac—3d, That said officer was with said jury while they had said

LITCHFIELD COUNTY,

cause under consideration—4th, That said justices had not jurisdiction of said cause ; because justice Hale belonged to Sharon, and both said parties to Salisbury ; and the honorable J. Porter, Esq. chief judge of the county court, lived in Salisbury and could judge between said parties—5th, That said verdict was not received on the premises where said force was committed—6th, That said verdict was not received until eight o'clock on Saturday evening—7th, That said Isaac produced on said trial no evidence of his title—8th, That said trial was had at said Isaac's house where he dwelt—9th. That one of the jurors, while said cause was on trial, stayed one night with said Isaac at his request, and conversed freely with said Isaac and his wife upon said cause, and received from them material testimony, which was not exhibited on said trial—10th, That said verdict was contrary to law and evidence.

This motion was overruled by the court, who proceeded and gave judgment that the jury having found the defendant guilty—that he be put out of the possession of said lands and that said Isaac be resealed and put into the possession—and that he recover of the said Thomas his cost, taxed at £10-7-1—and that execution be issued accordingly.

There was also a plea in abatement put in, to this process—1st, That said justices upon complaint made, ought to have gone and viewed the place where the force was said to have been committed—2d, That the trial in such cases, should be on the premises—3d, That the complaint was insufficient. Which plea was judged insufficient, and said complaint to be sufficient.

The said Thomas also filed a bill of exceptions, to the order of court, in admitting two certain writings to go to the jury—one under the hand of said Thomas, dated the 26th of November A. D. 1793, wherein he gave up the possession of said premises to his father James Bird, and promised never to lay claim to the same, by virtue of his having had the possession.

The other writing was dated the 19th of February A. D. 1794, under the hand of James Bird his father, wherein he delivered over to Isaac Bird, the possession of said premises, which he had received from his son Thomas.

Errors assigned were—1st, That said justices ought to have adjudged said plea in abatement to be sufficient—2d, That they ought not to have admitted said writings to have gone to the jury—3dly, That they ought not to have overruled said motion in arrest, without answering it. For these and other errors the plaintiff in error prayed said judgment might be reversed. Plea—nothing erroneous. The court found that there was manifest error in the judgment complained of.

By the court—The first and ninth exceptions in the motion in arrest, contain facts, which if true, are clearly sufficient to set aside the verdict. The answer of the court was, that they overruled the motion, which leaves it uncertain whether they found the motion not to be true, or judged it to be insufficient; for this uncertainty the judgment is bad—and it is incident to every court, who are authorised to try causes by a jury, to set aside their verdicts for just cause. In every record of a judgment founded upon the verdict of a jury, the verdict ought to be inserted, and not merely the opinion, or inference of the court of what the verdict is, and where the entry is so made, it is erroneous.

After judgment of reversal, the said Thomas Bird, moved that he might be restored to the possession of the premises, of which he was dispossessed by the justices judgment. By the court, he can be restored to the cost he has paid to the adverse party, and what he ought to have recovered; but restoring of the possession, cannot be awarded in this case, any more than in the case of ejectment, where the party has taken possession under a judgment, which the defendant afterwards gets reversed by error, he must have recourse to his action of ejectment.

LITCHFIELD COUNTY,

Christopher Johnson *vers.* Jesse Smith.

On a hearing in damages on a bond, conditioned to pay a certain sum according to a schedule of debts due from the parties jointly, the court gave judgment not only for the sums paid by the plaintiff, but for those he was liable to pay.

ACTION on bond, for £800, dated May 12th 1793, with a condition annexed, that if the defendant should pay £424-11-11 New-York money, agreeably to a bill of the date of said bond, signed by both Johnson and Smith, in the possession of said Johnson, without any cost or trouble to him, then the bond to be void ; which said bill was a schedule of debts due to merchants in New-York from said Johnson and Smith. The declaration averred that the defendant had not paid said debts, and that the plaintiff had been obliged to pay them.

The defendant demurred to the declaration. And judgment—That the declaration was sufficient.

The defendant moved to be heard in damages ; on which it appeared that the plaintiff had paid one of said debts, before the date and impetration of his writ, and that pending this suit, he had paid several of them ; and that some of them had been paid by the defendant, and that some of them remained yet unpaid, on which both were jointly liable. The question made was whether the court could give judgment for any more than the plaintiff had paid before the commencement of his action ?

The court gave judgment for the whole sum expressed in the condition of the bond, deducting what the defendant had paid.

By the court—The whole penalty of the bond is forfeited, and the defendant has become liable for it. This recovery will be a bar to any after suit that may be brought upon the bond—it is not like a covenant where the breaches may happen at different times. This is a hearing in damages, and it is right and just that the plaintiff should recover a full indemnity upon the bond ; and if the defendant afterwards should be compelled to pay any of those debts, an action of indebitatus assumpsit will lie to recover the monies back from the plaintiff.

Daniel and Alexander Elmore *vers.* Joshua Austin.

PETITION in chancery, shewing that on the 23d of April A. D. 1784, the petitioners sold a farm of land in New-Hartford, supposed to contain three hundred acres, to Ebenezer Butler and Ebenezer Butler, jun. for £402 lawful money; which farm was particularly bounded and described in said deed; and which said Butlers re-mortgaged to the said Elmore to secure the purchase money. That said Butlers, by deed dated the 15th of May A. D. 1784, sold and conveyed thirty-five acres of said farm on the north side of it to David Butler. That on the 13th of November A. D. 1786, said Ebenezer Butler, jun. sold and conveyed all his right and title to said farm, unto Jesse Butler. That on the 28th day of February, 1787, the debt for which it was mortgaged not being paid, it was agreed between the said Elmore on one part and the said Ebenezer and Jesse Butler on the other part, that the said Elmore should give up said mortgage; and that the said Butlers should re-convey to said Elmore the whole of said farm, excepting the thirty-five acres sold to David Butler, and which they considered and represented to be but thirty acres; which said Elmore agreed to accept on account of the original purchase money—and applied to a justice of the peace and informed him of the quantity, situation and bounds of the land, and of their agreement, and desired him to draw proper deeds, for said Butlers to execute, which would give effect to said agreement. That said justice by mistake drew the deeds in the following manner, viz. a certain piece of land in New-Hartford, containing one hundred and thirty five acres, being a part of a farm containing about three hundred acres, and bounded the same as in the first deed, from the Elmore to Ebenezer and Ebenezer Butler, jun. That the deed signed by Ebenezer Butler, was with warranty; and the deed signed by said Jesse Butler, was a quitclaim of all his right, title and interest to one hundred

A court of chancery will grant relief against the mistakes of a scrivener in drawing a deed; also against the person who attempts to take advantage of it.

and thirty-five acres of land, being a part of a farm containing about three hundred acres—that the said Ebenezer and Jesse Butler, being tenants in common, the quit-claim of all said Jesse Butler's right in one hundred and thirty-five acres of said common estate passed only a moiety—that Ebenezer, the other tenant in common, by his deed of bargain and sale, conveyed one hundred and thirty-five acres, out of two hundred and seventy acres, thirty acres being sold to David Butler. Said petition also stated that said farm was found to contain three hundred and twenty-five acres; and that deducting the thirty-five acres conveyed to David Butler, left two hundred and ninety acres, instead of two hundred and seventy as was supposed. That said Elmore received said deed, and took possession of said farm, and discharged said debt, supposing said deeds conveyed to them the whole of said two hundred and ninety acres; and that said Joshua Austin, knowing of the agreement of the parties aforesaid, and observing that said deeds from said Ebenezer and Jesse, conveyed only one hundred and thirty five, and the half of one hundred and thirty five acres of said whole tract he applied to said Jesse and Ebenezer Butler, and for a trifling consideration obtained from them a quit-claim deed, dated 23d of February 1793, of all their right and interest, in and to said farm—by force of which, he got the legal title to about eighty seven acres of land in said farm, which was most equitably said Elmore's. That said Austin entered into possession, and the said Elmore's brought their action to eject him, and in a trial of that cause they first discovered said mistake in said deeds. That the petitioners were remediless at law, and that they had lost their land by the mistake made by the justice, in whose judgment and skill they placed confidence in drawing said deeds—praying that said mistake might be set right, by ordering and decreeing that said Joshua Austin release to the petitioners, all the right he had, by force of said deeds from said Ebenezer and Jesse Butler.

This petition was heard and granted—and a decree passed, that said Austin should release said lands to the petitioners, under a penalty, and pay the cost of this petition.

By the court—The petitioners are entitled to relief on two grounds—1st, on account of the mistake of the justice in drawing the deeds—and 2dly, on account of the fraud practised by the respondent.

Mary Porter, relict of Mark Porter, deceased,
and five minor children, *vers.* Jabez Bacon.

PETITION in chancery, shewing that said Mark, in his life time, viz. on the 14th of August A. D. 1783, with one Ward Peck, contracted to purchase of said Bacon, a tract of land, containing eighty acres, for the sum of £360 lawful money, payable as follows, viz. one note for £60 payable in two years from said 14th of August 1783, with interest; one do. in three years; one do. in four years; one do. in five years; one do. in six years; one do. in seven years; all said notes being on interest—and that said Jabez would give a bond in the penal sum of £1000 that he would convey to them said tract of land, upon their paying all said notes by the times therein specified; which said notes and bond were executed, and by agreement of said Bacon, the said Mark and Ward entered into the possession of said land, and used and improved it about four years, it being in a wilderness state; and they having failed to pay any of said notes, they quitted the possession, and said Bacon entered and had ever since had the possession and improvement of the same. That said Bacon had recovered judgment upon one of said notes for the sum of £91-10 damages, and £9-7-8 cost; for which he had execution, dated the 7th of February A. D. 1793, which execution said Bacon caused to be levied and satisfied by two tracts of land of the said Mark Porter's, one containing thirty six acres and forty six rods, the other piece containing three acres and one hundred and eleven

Chancery will not relieve a purchaser, who has a bond for a deed of land, upon paying up certain notes, unless all the notes are paid, although the land is taken back.

LITCHFIELD COUNTY,

rods, particularly described in the petition. That said Mark Porter, died in October 1794, and his estate was represented insolvent, and commissioners were appointed, who had allowed against said estate for said Peck's improvement of said farm said four years, and for the timber cut upon it, \$11 lawful money, which the administrator was liable to pay; whereby said Jabez had got said land and an allowance for the use and improvement of it, while it was in the possession of said Porter and Peck; also had recovered said two pieces of land in payment of one of said notes given for said land—praying that said Jabez be decreed to reconvey the two pieces of land taken by execution aforesaid, to the minor heirs of said Porter, so as that the said Mary Porter might have her dower, or in some other way to grant relief.

This petition was heard at large upon the merits. The facts stated in the petition were all proved and admitted: Also a further fact was shewn by the respondent, viz. that said Bacon had sued another of these notes, which, after many trials in the law and much expense, he finally failed of recovering. Said Bacon also set up a claim that said farm was of less value, on account of what said Porter and Peck had done upon it. And that these matters ought to be offset against the judgment he recovered on said note.

The court dismissed the petition, upon the ground that the petitioners had no relief in chancery; that the transaction must be considered as a mortgage, and the petitioners' remedy was only by paying up the remainder of said notes.

Judges Root and Mitchel dissented from the opinion of the court, for the following reasons, viz. This bond contains an agreement on the part of Bacon to convey said land upon payment of the notes; and a court of chancery would unquestionably order Bacon to convey the land upon payment of the money, although it should not be paid or tendered, till after the time, specified in the bond, should be elapsed. Yet it is a personal agreement only, and does not run

with the land, as is the case of a mortgage, nor would payment of the money precisely by the time invest the payer with a title, but he must resort to a court of chancery, to obtain a deed by enforcing a specific execution of said agreement. Besides, the title upon record is an absolute title in said Bacon; and the bond is a private agreement, under the control of the party and cannot affect purchasers. This is a very hard case on the part of the petitioners. Bacon has recovered about £100 of the price of said land, he has recovered pay for the use and improvement of this land, and also for the timber cut upon it while in the possession of Porter and Peck, and has got the land. It is self-evident that this is not right. *McEwen vs. Hannah Wells*, Root's Reports, 202. It has been decided that a mortgagee may pursue his remedy upon his bond, or upon the mortgage, or upon both. If he recovers the money upon the bond, it discharges the mortgage; if he takes the mortgaged premises and makes them his own, by foreclosing the equity of redemption, the bond or debt is thereby paid and discharged. In this case, Porter, &c. after four years' occupation, not having been able to pay any thing upon said note, quit the premises, and resigned them up to Bacon. Bacon takes back the land, enters into the possession, and has continued in ever since. In this case there is no such thing as an equity of redemption to be foreclosed; there is an agreement to convey on certain conditions, which a court of chancery will enforce specifically, and will relieve against the lapse of time, in case any thing happened that the money could not be paid at the time. Porter's quitting the land, and Bacon's receiving, accepting and entering upon it, was a practical declaration, that he took the land to himself, which in the nature of the thing was a satisfaction and discharge of said notes.



LITCHFIELD COUNTY,

David Cressley *vers.* Elijah Phelps, &c. heirs
of Abel Phelps and — Lillie.

Chancery will
not decree a-
gainst a bona
fide purchaser
for valuable
consideration,
without notice.

PETITION in chancery, shewing that said Abel in the month of March A. D. 1777, for a valuable consideration, sold and conveyed by deed, two hundred and seventy-four acres of land, in Norfolk, to Isaac Pettibone—and that said Isaac for a valuable consideration, sold and conveyed the same lands to the petitioner—that the deed from said Abel to said Isaac was not put upon record, and was lost, or had got into the hands of the heirs of said Abel—that said Abel was dead, and said Isaac had become a bankrupt—that said Elijah one of the heirs of said Abel, had purchased of most of the other heirs their shares—and had sold eighty acres of said land to — Lillie, who had knowledge of said transactions—Praying that the petitioners might be compelled to give deeds proper to invest him with the title to said land.

The court heard the petition on the merits and found the facts to be true, except the science of said Lillie, and granted relief against said heirs as to all the land, but the eighty acres conveyed to said Lillie, and negatived the petition as to said Lillie; for it appeared that he was a bona fide purchaser for a valuable consideration, without any notice of said deed to said Isaac.

Ranny and Wolf *vers.* Joshua Church.

A petition for
a new trial,
brought against
a person, who
has been ac-
quitted in an
action of
trespass against
him and others,
will not exclude
him from testi-

PETITION for a new trial, in an action of assault and battery, brought by said Church against the petitioners and one Cassin—stating, that on the trial of said action, said Cassin was acquitted by the jury, and said Ranny and Wolf were found guilty—praying for a new trial, on the ground that the petitioners were able to evince their innocence by the testimony of said Cassin. The respondent said Church objected against said Cassin's testifying, on the ground, that he

had brought a petition for a new trial against said Cassin in the same cause, which petition was now depending—alleging therein that he had discovered new evidence sufficient to convict said Cassin. fying for the others upon a petition bro't by them.

By the court—It appears by the records of this court that Cassin is not interested, and Church bringing forward a petition against Cassin for a new trial, will not exclude him from testifying.

Abraham Nelson *vers.* Jedidiah Hubbel, executor of Hendrick Winegar, deceased.

ERROR to reverse a judgment of the county court, in an action of debt on a bond, executed by said deceased, on the 3d of June 1773, for £177-15-8, New-York money—writ dated 4th of March 1791. A creditor to an insolvent estate, who would avail himself of the saving clause in the Statute, must be within it himself.

The defendant plead in bar to said action—that on the 14th of February 1787, he exhibited to the court of probate a true and perfect inventory of the estate of said Hendrick Winegar, and at the same time represented said estate to be insolvent; and commissioners were appointed by said court, to examine and adjust the claims of the creditors, and to make return on the 1st of April then next; that on the 18th of said April said commissioners made their report to said court, which was accepted; and that the plaintiff did not exhibit said bond to said commissioners, nor had the same ever been allowed by them; and that the debts allowed, and the charges against said estate, exceeded the sum the whole estate was sold for.

The plaintiff replied, that said executor had omitted to inventory sundry articles of personal estate, and debts due to said estate, the property of said deceased, viz. and enumerated the articles, amounting in all to about the sum of £140; all which estate so shewn by the plaintiff was not inventoried by the defendant within the time limited by said court for settling said estate; nor before the date and impetration of the plaintiff's writ.

LITCHFIELD COUNTY,

The defendant rejoined—he admitted that said articles were not put into the first inventory, exhibited on the 14th of February 1787, but that soon after said articles mentioned in the plaintiff's reply, came to his knowledge and possession, he caused them to be inventoried in four several inventories, in addition to the first, viz. one on the 20th of March 1793; one on the 20th of June 1793; one on the 25th of January 1794; and one on the 11th of August 1794; all which had been exhibited to and accepted by said court of probate—and that the plaintiff ought to be barred, without that, that the several articles mentioned in the plaintiff's replication, were so discovered and shewn by him the plaintiff, as in said replication is alledged.

The plaintiff demurred to the defendant's rejoinder. The county court gave judgment that the rejoinder of the defendant was sufficient, and that he recover his cost.

Error assigned generally—and nothing erroneous plead.

In consideration of this case two questions arose, viz. first, whether the plaintiff had brought himself within the saving of the statute—2d, if he had, was this the proper remedy?

By the court—The true solution of the first question depends, upon the meaning of these words in the statute, "Other and further estate, &c. *not before discovered and put into the inventory.*" There was no time limited in this case, in which the executor should settle the estate, only a time for the creditors to exhibit their claims to the commissioners, and in which they should make their report. The statute is, "that if upon the report of the commissioners the estate appears to be insolvent, the judge shall set out to the widow her dower, and necessary furniture, and shall order the remainder of said estate to be sold, including her dower, with the income; and after full payment of debts of a certain description, and charges, &c. the residue to be

“ paid to the several creditors, who have substantiated their claims according to said act, in proportion to the sums to them respectively owing.” To what time, or transaction, has the words *not before*, relation? To the time of making out the average, or to the time limited for the creditors to exhibit their claims in? The latter is the next foregoing antecedent, as set down in the statute; but the former seems to be the true spirit and reason of the statute; for it is very clear, that it is not intended that the average made out should be any way infringed and broken in upon—and there is nothing more common than for additional inventories to be exhibited, even after the return of the commissioners is made; and the average is made upon the whole estate contained in all of them. But in this case there is no averment, either of the time, or of the fact of discovering this estate. The plaintiff says the defendant omitted to inventory certain articles of estate, all which estate, *so shewn* by the plaintiff, was not inventoried, &c. but there is no averment that the plaintiff ever discovered or shewed any estate of the deceased to the defendant, to which the words, *so shewn*, can refer—so that the plaintiff hath not made out a case, which can bring up the question fairly.

In the case of *Leavenworth vs. Timothy Jones*, administrator on the estate of William Jones, deceased, in an action of debt on book. The plaintiff demanded one hundred pounds as being due from the said William Jones, by book at the time of his decease.

The defendant plead in bar, that said Jones's estate was duly represented and found to be insolvent; and set forth the inventory of his estate, and the debts allowed and reported by the commissioners; alleging that the plaintiff's debt was not exhibited to said commissioners, nor allowed by them, and that said estate was settled; and that the defendant had closed his account with the judge of probate; and that by the laws of the state the plaintiff was barred of any recovery.

LITCHFIELD COUNTY,

The plaintiff replied, and admitted said deceased's estate to be insolvent, and that his debt was not exhibited to said commissioners nor allowed; yet he said William Jones died vested and possessed of sundry parcels of land and other estate to the amount of more than five hundred pounds value, which was particularly set forth and described, and which was not put into the inventory of said William Jones' estate; and which the plaintiff had since discovered.

The defendant demurred to the reply of the plaintiff, and judgment of the superior court, that the plaintiff's reply was sufficient and for him to recover £72 damages and cost.

This judgment was reversed in the supreme court of errors in October A. D. 1789, upon a writ of error brought by said administrator—and for the following reasons:—

“It is our opinion that no administrator is liable to any suit upon an insolvent estate, which appears by the records of the court of probate, to have been fully settled; and can only be liable upon the ground of neglect or misconduct, especially pointed out in the plaintiff's declaration. For to admit creditors who have never exhibited their claims to the commissioners, to maintain actions upon other principles, would involve the most vigilant administrator in controversy, uncertain both in their nature and consequences; and would be inconsistent with the analogy and general policy of law, and with that security which a necessary trust ought to receive, to induce persons of discretion to accept it. Any neglect or misconduct of an administrator in conducting the settlement of an estate, will, upon being specially disclosed and proved, subject him immediately to answer damages resulting therefrom.”

As to the second question, whether this is the proper remedy? The law is, that no process in law, except for debts of a certain description, shall be admitted or allowed against the executors or administrators of any insolvent estate, so long as the same shall

be depending, &c. This paragraph takes away the remedy the creditors have in the ordinary course of law, whilst the insolvency is pending before the court of probate; and shuts them up to the only remedy before the commissioners. Then comes the paragraph which declares that whatever creditor shall not make out his or her claim, with such commissioners, shall forever after be debarred of his or her debt, unless he or she can shew, or find some other or further estate *not before* discovered and inventoried.

It is very clear that the law intends that the creditors who have had their debts allowed, should have the benefit of all the estate which at that time had been discovered and inventoried—and that the estate the creditor should after discover, should be the only fund from which he should derive payment; the remedy therefore must be such as applies itself to the new discovered estate only, and that will not subject the executor any further. The most natural and feasible method would be, for the creditor first to apply to the executor, shew him the estate, and get an inventory of it made and returned to the court of probate; then to move the court to open the commission of the commissioners, in order to examine his claim, and on its being allowed, to order the sale of the estate, and out of the avails, after deducting the charges, to pay his debt, or his average—for a person discovering other and further estate, will not entitle him to it, unless he has a just debt, and this must be ascertained by the commissioners, or at law. A question may then arise in what proportion he shall be paid, whether his average only with the other creditors, or in full of his debt, provided the new discovered estate is sufficient. The words of the statute are, that he shall be barred of his debt, unless he discovers other estate, &c. which seems to imply, that if he does, he shall be entitled to his full average in the whole estate, as far as such new discovered estate will go; and this can be no injury to the other creditors. The judgment of the court was,

LITCHFIELD COUNTY,

that there was nothing erroneous in the judgment complained of.

Doty and Olmstead, administrators of Samuel Judson *vers.* George White.

The court will not grant a new trial on the ground of strict law, to throw the party out of a just demand.

PETITION for a new trial, in an action of book debt, in which said White declared that the said Samuel, at the time of his decease, was justly indebted to him the sum of £80 lawful money—writ dated the 8th of July 1793; which action came to the adjourned superior court in November 1795, when the defendants prayed oyer of the plaintiff's account, and the whole of which was charged before the year A. D. 1786, viz. from 1770 to 1775.

Upon which the defendants plead that said deceased, at the time of his death, owed the plaintiff nothing by book, &c. Issue to the court.

The defendants relied upon giving the statute of limitations in evidence; but as the issue referred back to the time of said Judson's death, which was in A. D. 1777, when said debt was not out lawed. The court found the issue in favor of the plaintiff.

The petitioner now prayed for a new trial—1st, upon the ground of mispleading—and 2d, because said deceased had a book against said White, which was not brought in on said former trial.

Plea in abatement, in nature of a demurrer to the petition. And judgment—That the plea was sufficient.

By the court—The petitioners not exhibiting said account in said former trial, was their own lach and negligence. Whenever a party has missed his plea, which would have saved him in a just cause, the court will give liberty for him to alter his plea, or grant a new trial in the cause. In this case, there is no pretence but that the debt was justly due to the plaintiff, only that they might have cut the plaintiff off from recovering it, by pleading the statute of limitations, had

they plead it properly ; and now they ask for a new trial, in order to plead the statute, and bar the plaintiff of his right. The court have in no instance granted a new trial, to take a legal advantage, to throw the party out of a just demand.

David Doty *vers.* Thomas Judson, &c. in right of his wife Elizabeth, and the rest of the heirs of Samuel Judson, deceased.

PETITION in chancery, shewing that the petitioner and Abigail Olmstead, the relict of Samuel Judson, deceased, were in February A. D. 1780, appointed administrators on the estate of said Samuel Judson ; that disputes arose between him and the heirs of said Samuel, deceased, and that the petitioner agreed with said Thomas in behalf of himself and wife and the heirs of said Samuel, to submit said disputes to the arbitrament and final award of certain arbitrators, by them mutually chosen ; in manner following, viz. the petitioner to account for all the property belonging to the estate of said Samuel, which had in any way come into his hands, either as executor de son tort, or as administrator ; but not to be accountable for any property of said Samuel's, which had come into the hands of said heirs, or of the said Abigail, either before or since her intermarriage with Samuel Olmstead—the parties to be admitted as witnesses before said arbitrators.

Chancery will grant relief where injustice is done by mistake or otherwise, and the party is otherwise remediless.

That said arbitrators after hearing said cause, found due from the petitioner to said heirs, the sum of £240-7-9 lawful money, which they awarded him to pay said heirs, and £17-12-9 cost ; and judgment and execution had been since recovered against him, for the benefit of said heirs, for the sums awarded as aforesaid.

That before said arbitrators, said Thomas charged the petitioner with the sum of £100 New-York money, received of Stephen Platt, in June A. D. 1777, which he had not accounted for ; that the petitioner

LITCHFIELD COUNTY,

admitted the receiving of said £100 of said Platt, but alleged that it was received in December 1777, as attorney and agent to said Abigail; and that he then and there, on the 29th of said December, gave her a receipt in writing, for £100, and therein promised to apply said sum with other monies he had received, in payment of a bond due from said Samuel's estate to John Chambers, which bond said Abigail had undertaken to pay with one Sarah Wheeler; and that said receipt included said £100, which receipt was then in suit: but the testimony of the petitioner being contradicted by the said Abigail, and he not being able at that time to adduce any further evidence to that point, said arbitrators allowed said sum against the petitioner with the interest. That said Abigail with her husband said Samuel Olmstead, had recovered judgment on said receipt, for said £100 and interest, whereby the petitioner had been compelled to pay said sum twice. That the petitioner could now prove by William Palmer, a witness he knew not of at the time of said arbitration, that said £100 was received of said Platt, in December A. D. 1777, and that it was included in said receipt, given by the petitioner to said Abigail, on the 29th of December 1777—praying to be relieved against said award, and the judgment thereon, in such way as the court might think proper.

To this petition a demurrer was given. And Judgment of the court—That the petition was sufficient.

By the court—Although a new trial cannot be granted in such case, yet where a gross mistake has taken place in an award, either through the fraudulency of one of the parties, the corruption or error of the arbitrators; or through an inevitable failure of proof, being afterwards discovered; a court of chancery, upon application and proof, will grant such relief as the exigency of the case requires, to prevent a failure of justice where there is not adequate remedy at law.

Christopher Surdam *vers.* Ithuel Reed.

ACTION upon the covenants in an indenture, dated the 30th of April A. D. 1788—wherein and whereby, Peter Reed, guardian to the plaintiff, bound the plaintiff an apprentice to the defendant, until he should arrive to the age of twenty-one years, to learn the carpenter's trade, and the defendant covenanted to learn him the trade, and to dismiss him at that age with two suits of cloaths, &c. The indenture was signed by said Peter Reed, the guardian, and Ithuel Reed, the defendant, only.

A defendant having admitted the plaintiff's right of action, and submitted to arbitration by rule of court, may not object to the acceptance of the award, on the ground that the plaintiff had no right of action.

The plaintiff being of age commenced this action, alledging that the defendant had not learned him the trade, nor furnished the two suits of cloaths, &c.

This action was referred by rule of court. The referees returned their award that they found the defendant guilty, and awarded him to pay the plaintiff the sum of £

The defendant moved in arrest of judgment, that the action did not lie in favor of the plaintiff, who was the apprentice, upon the covenants in the indenture; but the action must be by the guardian, who was the only party that signed the indenture.

Two questions were made—1st, Whether the plaintiff for whose use the covenant was made by his guardian expressly by name, to learn him the trade, &c. may have this action in his own name?—2d, If he might not, whether the defendant could take advantage of it, in this stage of the cause by way of remonstrance to the award of arbitrators.

By the court—Whatever doubts might have arisen upon the first question, the court entertained none as to the second; for after the defendant had admitted the plaintiff's right of action in the fullest manner, by submitting it by rule of court to arbitration, and the referees had made their return, it is too late to object to the plaintiff's right of action; the award therefore was accepted and enforced.

Parmele Edwards vers. — Lambert.

The court will grant a new trial where it appears that the case was lost by the mistake of the counsel—and also to prevent inconsistency in the decision of the law upon the same point.

PETITION for a new trial, in an action of trespass, assault and battery, and resisting the plaintiff as an officer, in the execution of his office, in attempting to levy a warrant on Samuel Parmele, for a military delinquency ; in which action verdict and judgment passed against the petitioner for £20 damages—stating, that said warrants were granted by captain Church, for fines imposed in A. D. 1793, for military delinquencies, which happened before October 1792 ; and said warrants were dated in 1793, and directed to said Lambert, the orderly sergeant of said company—and that in October 1792, the general assembly repealed the whole code of military laws, under which the delinquencies happened ; and that by the superior court and the supreme court of errors said warrants had been adjudged to be illegal and void—and that the council for the defendants in said cause, by mere mistake of the law, did not object to said warrants going to the jury ; and that they were delivered to the jury, and were the only ground on which the jury found their verdict against the defendants. And this they were able to prove by the jury who tried said cause. On the hearing of said petition an objection was made to inquiring of the jury, as to the grounds of their verdict ; but by the court they may be enquired of. They testified, that they considered one, if not all said warrants to be legal, and that the defendants, they thought, used more force than was necessary ; but that they never contemplated the case exclusive of the warrants. A new trial was granted, on the ground that it was a mistake in the council in not objecting against the warrants going to the jury ; and it seemed to involve a very great absurdity, that a verdict should stand against the petitioner, upon the sole ground of the legality of warrants which had by the highest courts in the state been adjudged to be illegal and void.

Sedgwick, Patterfon and Mallory, Selectmen of Cornwall, and the rest of the inhabitants of said town *vers.* John Pierce.

PETITION in chancery, shewing that the general assembly, in October, 1737, passed an act directing the sale of all the townships in the western lands, and that each township lying on the east side of Oufatonuc River, should be divided into fifty-three rights, exclusive of former grants made by the general assembly; and that one of said rights should be for the use of the ministry forever, that should be settled in such town according to the constitution and order of the churches established by a law, entitled an act relating to ecclesiastical affairs—amongst which was the township of Cornwall; and by force of said act, one of said fifty-three rights in said township of Cornwall, was sequestered forever, for the use of the ministry in said town. And said township was soon after sold by the general assembly to sundry proprietors; and in May, A. D. 1740, the general assembly passed an act incorporating the inhabitants and proprietors into a town by the name of Cornwall. That from October, 1737, there had been no ecclesiastical society existing there agreeable to said act except the inhabitants of the town of Cornwall, who had always had the power of improving said right of land, so reserved, for the use of the ministry. That said town, by the selectmen or a committee, leased out said lands to various people, for large sums of money; which were the property of said town, to be applied for the use of the ministry in said town; which monies had from time to time been entrusted to the care and keeping of John Pierce, Esq. to be improved and loaned for their benefit; some of which he had loaned and had the obligations in his hands; and refused to render an account of said monies or securities; and that the evidence of his having said monies and securities was in his knowledge and possession; and the petitioners had no means of evincing it, but by his testimony—Praying that he

The first ecclesiastical society in a town, is entitled to the interest granted to the town, for ecclesiastical uses, when it consisted of but one society.

LITCHFIELD COUNTY,

might be compelled to disclose on oath, what monies and obligations had come into his hands and what he now held ; and that he be ordered and decreed to pay and deliver the same over into the hands of the selectmen of said town.

To this petition the respondent pleaded in abatement—

1st, That since the incorporation of said town, viz. in A. D. 1774, a part of said town, with the inhabitants thereof, had been by an act of the general assembly annexed to the town of Kent, for ecclesiastical purposes only ; where they still remained.

2d, That another large part of said town, with the inhabitants, were in A. D. 1780, by an act of the general assembly, annexed to the town of Warren, for ecclesiastical purposes.

3d, That in A. D. 1793, another part of said town, with the inhabitants, were set off and annexed by law to the society of Milton.

4th, That in A. D. 1782, more than sixty of the remaining inhabitants of said Cornwall, among whom were said Sedgwick, Patterfson and Mallory separated themselves from the church in Cornwall, as established by law, and formed themselves into a distinct society for the purpose of public worship, and denominated themselves congregationalists, agreeably to a law entitled an act, for exempting those people called separatists, from paying taxes for the support of the established ministry ; and who so remained and were called the second society in said town.

5th, That the inhabitants of said town, who had not been set off, nor separated as aforesaid, in A. D. 1782, formed and organized themselves into an ecclesiastical society, according to the constitution and order of the churches, as established by law, and were and are in fact and name the first ecclesiastical society in said town of Cornwall, and ever have been so recognized and called ; and have a minister regularly ordained and settled amongst them, and have ever

held and enjoyed said monies, and the interest which had arisen thereon.

6th, That said first society by their legal vote, passed on the 30th of November A. D. 1795, appointed Seth Peirce, Zachariah Jones, and Abel Tharp, a committee to receive and take care of said monies, &c. for said year.

7th, That said town of Cornwall, on the 29th of December 1794, in legal town meeting, voted, that the public parsonage and monies, be appropriated, and the annual avails paid equally to each of the ecclesiastical teachers in said town; and the select men were thereby directed to carry said vote into effect.

8th, That said town on the 7th of December 1795, appointed a committee to take care of the public parsonage monies, obligations, &c.

To this plea a demurrer was given, and by agreement all the facts in the case, not included in the petition, were thrown into the plea, in order to try the question fairly; and after a full hearing of the arguments, the judgment of the court was, that the plea was sufficient.

By the court—Every town incorporated by law, contains in it all the rights, powers and privileges of an ecclesiastical society, and are subject to all the duties: and so long as they remain one entire body, may manage their ecclesiastical concerns in town meeting; but as soon as the inhabitants become separated, for ecclesiastical purposes, as a part being set off and annexed to other societies, they must cease to transact their ecclesiastical business in town meeting—as a town they include all the divisions—as an ecclesiastical society they exclude them. And this ecclesiastical society continues to exist through all the divisions and subdivisions, and hath right to have and hold all interests granted to the town for ecclesiastical uses, at a time when there was no other ecclesiastical society in the town that could take.

Sedgwick *vers.* David Waterman, agent of the proprietors of the ore bed in Salisbury.

A CTION declaring that the proprietors advertised a good ore dug for sale, at 10/8 per ton, and 2/6 in the bed; that the plaintiff purchased of them eighty three tons of ore in the bed, for which he paid 8/ per ton for raising it, and 2/6 for said ore; that said ore was bad, so that he could not make iron of it—damage £100.

A sworn copy of an original vote or entry will be admitted, if the original, in the hands of the adverse party, is withheld.

Plea—Not guilty. Issue to the jury.

The facts in the case were—the general assembly by their act, made and constituted the proprietors of said ore bed, a company or corporation, with power at their meetings to make bye-laws and rules, respecting said ore bed; to appoint a clerk, and constitute agents, &c. That one Loveland, sold and delivered the ore and received and gave his receipt for the pay for it. The plaintiff produced a sworn copy of the defendant's appointment, as clerk or agent for the company, as entered on their books, which they refused to produce and show. This copy was objected against, but was admitted by the court; it being the best evidence in the plaintiff's power to obtain, the original being in the hands and possession of the defendants, and they refused to produce it—and Loveland the clerk of said company was admitted a witness and sworn, and testified to the quantity of ore which was sold and delivered.

The ore was proved to be very bad. The jury found a verdict for the plaintiff, which was accepted by the court.

Ebenezer Church *vers.* Roswel Ruffel.

A CTION of ejectment, for two pieces of land, described in the declaration.

An officer's return upon an execution levied upon land, that the appraisers were legally appointed.

Plea—No wrong or disseisin. Issue to the jury.

The plaintiff's title was, the levy of an execution on the demanded lands, against Stephen Ruffel, who

was owner of the lands, made on the 31st of December A. D. 1794. and sworn—
adjudged to be
a good return.

The defendant set up a deed from said Stephen of the same lands, dated the 23d of April A. D. 1793. The plaintiff challenged said deed to be fraudulent. The defendant objected against the levy of the plaintiff's execution going to the jury, on the ground that it was legally deficient.

The return of the officer was, that said land was appraised by A, B and C, indifferent freeholders of, &c. who were legally appointed and sworn, by Elijah Rockwell, justice of the peace, and who appraised said land at £37-2, &c. The return was, that the appraisers were legally appointed and sworn, but did not shew how they were appointed, so that the court might judge whether they were legally appointed or not.

The court admitted the return upon the execution to go to the jury; and verdict and judgment for the plaintiff to recover. It being proved that the deed to the defendant was fraudulent, made to defeat creditors of their just debts.

Town of Salisbury *vers.* Town of Harwinton.

ACTION of the case, declaring that on the 4th of March, A. D. 1793, Timothy Steadman, one of the poor inhabitants of the town of Harwinton, came with his wife and two children into the town of Salisbury; that his wife and one of his children fell sick there, and the select men of said Salisbury were obliged and did provide doctors and nurses for them, and other necessaries, boarding, washing, and lodging, to the amount of £25, of which notice had been given to the defendants, and payment requested and refused; whereupon the defendants became liable to pay for said expenditures, and in consideration thereof they assumed and promised to pay the plaintiffs, &c.

In an action of indebitatus assumpsit, in favor of one town against another, for supporting a pauper, the select men admitted to prove the advancements.

Plea—Non assumpsit. Issue to the jury.

LITCHFIELD COUNTY,

The select men of Salisbury, one of whom was named in the action, were admitted as witnesses, notwithstanding they were objected against, to prove the advancements which had been made.

Lewis *vers.* Town of Litchfield.

An action at common law lies against a town for damages sustained through the insufficiency of its bridges.

ACTION of the case, declaring that on the 10th of January last, the plaintiff owned a certain mare, worth ninety dollars; that as his servant was riding on his business in the public road in said town of Litchfield, and in crossing a certain bridge, which it was the duty of said town to keep and maintain in good and sufficient repair, said mare slipped her foot through a hole in said bridge and broke her leg—whereby he had wholly lost said mare.

Plea—not guilty. Issue to the jury, and verdict for the plaintiff.

A motion in arrest of judgment was made after verdict, by the defendants, that this action would not lie at common law, and only upon the statute. The motion in arrest was adjudged insufficient.

By the court—The statute has made it the duty of the towns to make, keep and maintain in good and sufficient repair all necessary bridges, &c. in their respective limits. This creates the duty and gives an action to recover damages, against any town for damages sustained, through the neglect of their duty in that behalf. The statute in order to enforce upon the towns the importance of doing their duty, has annexed a penalty upon those towns who neglect after having had notice of the defect, viz. that they shall pay double damages, to the party injured. But this does not take away the plaintiff's remedy at common law, for the single damages.

Richard De Kentland *vers.* Afahel Somers.

ACTION of debt on judgment, declaring that the plaintiff in the superior court in February A. D. 1776, recovered a judgment for £106-12-7 damages, and £8-6-5 cost, against the defendant and David Goodrich of Sharon, since deceased—which debt neither the defendant nor said Goodrich had ever paid.

Upon a nuel record plead to a record of a judgment against David Goodrich; a record of a judgment against David Goodrich, jun. will not support the issue.

Plea—That there was no such record and judgment as the plaintiff had set forth in his declaration.

The plaintiff replied, that there was such a record and judgment, and prayed the court to inspect the record. Upon inspection, it appeared, that the judgment was against said Somers and David Goodrich, jun.

Judgment of the court—That there was no such record and judgment, as set forth in the plaintiff's declaration.

Ashbel Humphry *vers.* Vir. P. Boge.

ACTION of ejectment, for about one hundred acres of land, described in the plaintiff's declaration.

Several collectors cannot join in one deed of the lands sold by them severally for taxes.

Plea—that the defendant had done no wrong or disseisin. Issue to the jury.

The plaintiff was the original proprietor of lot No. 21, in the first division of lands in the town of Winchester, of which the demanded premises were a part.

The defendant set up title to a part of said land, under a deed from Rdswel Coe, a collector of taxes, to one Samuel Smith, and to the other part of said land under another deed from five collectors jointly, to said Samuel Smith.

The plaintiff objected against these deeds going to the jury, on the ground that they were so defective in point, of both legal form and substance, that they

transferred no title at all. The deed from said Coe, was—"Know ye, that I Roswel Coe, collector of rates for the town of Winchester, by virtue of one paragraph of a law, entitled an act for collecting and paying of taxes, having proceeded according to law, for the consideration of £6 lawful money for rates and cost, received to my full satisfaction of Samuel Smith, of Winchester, he being the highest bidder, do give, grant, bargain and sell, unto said Smith, his heirs and assigns, one piece of land, containing by estimation thirty one acres and one hundred and ten rods, and is part of lot No. 21, in the first division of lands in said town, and is bounded," &c.

The deed from the five collectors jointly, was in the same form, except it did not express the sale to be for the payment of any taxes; and described the land sold, to be part of lot No. 21, in the first division of land in said Winchester, being seventy acres.

The deed from Coe, was permitted to go to the jury, upon the ground that it had the formal parts of a deed; and its not expressing whose land it was, or for whose taxes it was sold, or that it was in satisfaction of said taxes, might be supplied by other proof.

The deed from the five collectors was excluded by the court.

By the court—Each collector acts by a separate authority only, and cannot join; besides it would greatly injure and embarrass the owners of lands in redeeming them, if it was allowed to be done.

Livingston, &c. executors of the last will of Gilbert Livingston *vers.* Isaac Bird.

Executors cannot maintain actions of ejectment for lands, unless

ACTION of ejectment, for a certain tract of land, of which the plaintiffs alleged they were seised, in virtue of their said trust, and that the defendant had disseised them.

Plea in bar—that James Bird, late of Salisbury, deceased, was indebted to said Gilbert, deceased, by bond, in the sum of £255-18-3 New-York money, payable in one year with interest, and to secure the payment of said bond, on the 8th of January A. D. 1784, gave a mortgage deed of the demanded premises, defeasable by paying said bond ; and that the plaintiffs had no title but said mortgage deed, given to said Gilbert, deceased, and that said James remained in possession until his death. That said Gilbert instituted an action on said bond, and recovered judgment and execution against said James, for the whole sum due thereon, which was paid, satisfied, and discharged on the first day of March 1794, and before the date and impetration of the plaintiff's writ.

empowered by
the will, or the
deceased's estate
is insolvent,

The plaintiffs replied, that said bond was not paid by the time limited in the condition of the mortgage deed ; and although the said Gilbert recovered judgment and satisfaction for said debt, as the defendant in his plea in bar had alledged ; yet that said Gilbert in his life time, commenced an action of ejectment for said mortgaged premises, against James Bird, to the county court, holden at Litchfield, on the third Tuesday of September A. D. 1789, which by sundry removes came to the superior court, in August A. D. 1793, when said James died, and said suit abated ; in which action a bill of cost had been incurred to the amount of eighty dollars, that had never been paid.

The defendant demurred to the reply of the plaintiffs, and the case was continued to advise—and at August term, A. D. 1797, this cause was re-argued, and judgment—that the reply of the plaintiffs was insufficient, and for the defendant to recover his cost.

In the discussion and consideration of this cause, several points came up, viz. 1st, Whether executors could have and maintain this action of ejectment ? 2dly, If they could, were the costs incurred in the former action of ejectment a lien upon the mortgaged premises ? And 3dly, If they were not so to be considered, was the payment of the debt, subsequent to

LITCHFIELD COUNTY, &c.

the time limited in the condition of the mortgage a bar to an action brought to recover the mortgaged premises?

The court determined that executors had no right to maintain actions of ejectment for real property, without special provision in the will, or unless the estate was insolvent, and wanted for the payment of debts—neither of which existed in this case.

This point being decided against the plaintiffs, the court thought it unnecessary to make any decision as to the other two points.

David Shelton *vers.* Enos Dutton.

Action of trespass on land, not appealable unless the demand is more than twenty pounds.

ACTION for a trespass, committed on land, £20 damages only demanded.

Upon the declaration being read, it was observed by the court, that it was an action of trespass, in which the demand was but £20, and not appealable. The case was erased from the docket.

Jacob Bull *vers.* Peter Pratt.

In an action of trespass for mean profits, the court will not go back of three years.

In an action of ejectment for the land, the whole of the plaintiff's damages may and ought to be recovered.

ACTION of trespass, brought for the profits of a certain saw mill, from the year A. D. 1786, to August 1795, said to be worth £50 per annum—writ dated March 1796.

Plea—Not guilty. Issue to the court.

A question in this case was made, whether the plaintiff might go back of three years from the date of the writ, in the proof of damages? By the court—He may not.

The plaintiff recovered these premises from Pratt by action at law, and went into possession in August 1795, and brought this action for the mean profits.

By the court—Although this action has been sustained in this state for the mean profits, founded on

precedents in Great Britain, yet there can no sound reason be given, why the value of the improvements, as well as any other damage done to the estate should not be recovered in the action of ejectment brought for the land; and there are very weighty reasons in favor of it. It is multiplying law suits unnecessarily—and in the action of ejectment all the mean profits may be brought in. In this action the court can look back, only three years. The action of ejectment in England, is an assigned action to try the title only, in which damages for the mean profits are not recovered; ours is a real action, not only to try the title and recover the possession; but also to recover all the damages sustained by the plaintiff by the disseisin, possession, improvement, and other wrongs and trespasses committed and done by the defendant, during the time of his holding the demanded premises.

Hartford County, Sept. Term, A. D. 1796.

Thomas Newson *vers.* *Lemuel Storrs.*

ACTION of the case, declaring that the defendant on the 30th of November 1786, wrote the following letter to the plaintiff, viz.—“Middletown, “Nov. 30th, 1786. Capt. Newson—Sir, My brother “Roger Storrs informs me he shall dissolve partnership with Mr. Francis, therefore to enable him to “furnish himself with an assortment of goods entirely on his own footing; think it will be advantageous to him to take £100 on interest; if he should, “and it is agreeable to you to furnish him to that amount, I will become obligated with him for payment of it. Lemuel Storrs.”—Which letter was given to said Roger to deliver to the plaintiff and was accordingly delivered; and that the plaintiff upon the request of the defendant made in said letter and on

A request in a letter to let another have one hundred pounds, with a promise that the writer of the letter would be obligated with him for it if the money was advanced, will be obligatory on the writer of the letter.

his engagement therein, advanced £100 to said Roger; and wrote a note for said Roger and the defendant to sign, agreeably to said letter—which note was in words and figures following, viz. “December 5th, 1786.—For value received, we jointly and severally promise to pay to Thomas Newson £100 lawful money on demand, with the lawful interest, witness our hands”—and was signed by Roger Storrs. That the defendant was soon after notified that his brother Roger had received said £100 of the plaintiff, agreeably to his request in said letter.—And in consideration thereof, the defendant promised and engaged, as in said letter or writing, that he would become obligated with said Roger for the payment of said £100 and the interest by his bond or note.—That in November 1788, said Roger failed in business, and shut himself up from his creditors, and made over all his property to the defendant; and that the defendant first informed the plaintiff of said Roger’s having failed—and the plaintiff presented to the defendant said note signed by said Roger, for him to sign; but the defendant refused to sign it, or to become bound any way with said Roger for said £100, and had wholly failed of performing his said promise, and said debt had never been paid.

Plea—non assumpsit. Issue to the jury, and verdict that the defendant did assume and promise in manner and form, and for the plaintiff to recover.

The defendant made a motion in arrest of judgment, that the plaintiff’s declaration and matters therein contained were insufficient in the law.

The exception taken was, that said letter was only a proposition to know whether the plaintiff would loan the sum or not, and if he would, the terms were to be settled, before the money was delivered.

In answer to this it was said, that the letter contained a request, for the loan of the money and engagement to become obligated with said Roger for the same; in case the plaintiff would advance it; and that the advancement of the sum by the plaintiff

was complying with the terms of the letter, and the defendant thereupon became absolutely holden and bound—and that it was alledged in the declaration that the defendant was notified that the money had been advanced, and that he in consideration thereof, assumed and promised to be become obligated, &c.

The motion in arrest was overruled, and judgment that the declaration was sufficient and for the plaintiff to recover.

By the court—This is plainly no more nor less than a letter of credit sent by the defendant to the plaintiff, for him to let his brother have £100, and that he would become obligated with his brother for the payment of it. The money was advanced to the defendant's brother agreeably to the request in the letter, and the defendant became holden to give his obligation with his brother, to the plaintiff for the payment of it.

Nathaniel Talcott, jun. *vers.* Sylvester and Joseph Pulfifer.

WRIT of error to reverse a judgment of a justice, upon the confession of said Nathaniel to said Pulfifers, in words following, viz. "Hartford ss. Glastenbury October 22, 1793, personally appeared Nathaniel Talcott, jr. and confessed, that he owed Sylvester and Joseph Pulfifer, the sum of £20 lawful money, due on note, dated October 22d, 1793, given to said Sylvester and Joseph Pulfifer, whereupon this court give judgment, that the said S. and J. Pulfifer recover of the said Nathaniel Talcott, jun. the sum of £20 lawful money damages, and 1/6 cost. Execution granted the 22d of October 1793."

A judgment by confession on a note for £20 delivered to arbitrators as an escrow, to oblige the party to abide the award they shall make, is erroneous.

The said Talcott complained that in rendering said judgment, manifest error had intervened; and especially assigned—that said note was an escrow, given only to oblige said Talcott to abide the award certain arbitrators should make on certain matters of contro-

HARTFORD COUNTY,

verfy submitted to them, and for no other confideration or indebtednefs, and was not for any debt then due from faid Talcott; and that faid judgment and execution were to be fubject to faid award whether any thing was due from him or not; and for that purpofe were to be delivered into the hands of faid arbitrators, who were to endorfe them down to the fum they fhould find due from faid Talcott.

Plea—Nothing erroneous. Judgment—Manifest error.

By the court—The note is fuch, that a juftice has no right by law to take a confeffion upon; it being an efcrow, and not a note for a debt due and owing; and it is altogether againft the policy of the law to place an award, which is to be made in fuch manner, that the party can have no remedy or day in court to except againft it, let it be ever fo corrupt or miftaken. It is objected by the defendant, that the averments in the writ of error are contrary to the record of the juftice. The averments, in the writ of error do not contradict the record, admitting the juftice had jurisdiction—They are that the note confeffed upon, was an efcrow; on which it follows, nothing could then be due, but was fubject to a future contingency, and not a debt which a juftice had authority by law to accept a confeffion of from one perfon to another; and that the whole was coram non judice; like a judgment of this court, upon a bond vouched by two witneffes for the payment of £100 in money only. To fet forth the bond in a writ of error, would not contradict any record. See *Curtice vs. Scovel* and *Curtice vs. Bulkley*, 1 vol. Root's Rep. 327 and 329.

Miller verf. Lynde.

A caufe bro't
by a citizen of
this ftate againft
a citizen of this
ftate jointly
with citizens

PETITION of Phineas Miller, John C. Nightingale of the ftate of Georgia, and Nathaniel Patten and others, of the ftate of Connecticut—Shewing that Jofeph Lynde of Hartford in the ftate of Connecticut, had preferred his petition in chancery againft

them to this court—That said Miller and Nightingale were citizens of the state of Georgia, and that the demand made in said petition amounted to 750 dollars, exclusive of cost—That said Miller and Nightingale only were concerned in interest in said petition, the note on which the suit mentioned in said petition was brought, being assigned to them and was their property; and they were desirous of removing said cause to the circuit court next to be holden in the state of Connecticut, praying that the petitioners in said petition might have liberty to remove said petition to the next circuit court to be holden at Hartford in Connecticut on the 25th day of September instant, upon their procuring good and sufficient security to enter the copies in said circuit court, &c.

of another state,
is not remova-
ble to the cir-
cuit court of
the United
States.

To this petition or motion, a demurrer was given.

The petition referred to, was, Joseph Lynde *vs.* said Miller, Nightingale, Patten and others—Complaining of a fraud practised in obtaining from him the note mentioned in said suit, about which said petition was conversant, and to which all the petitioners were privy, and in which they were concerned; and praying for a disclosure from each and every of them on oath; and that this court would grant such relief as the justice of his case required.

The motion of Miller, Nightingale, &c. was adjourned to advise.—And at the adjourned superior court, it was determined that the application to remove said petition to the circuit court, could not be granted.

By the court—The several state courts originally had jurisdiction of all causes of every description arising within their respective territorial limits; of crimes committed upon the high seas, and of all causes of maritime or admiralty jurisdiction.

The federal courts have jurisdiction only of such causes as by the constitution is expressly given to them; all the rest remain in the state courts. The words in the constitution, are,—

SECT. 2d. "The judicial power, shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ; to all cases affecting ambassadors, other public ministers and consuls ; to all cases of admiralty and maritime jurisdiction ; to controversies to which the United States shall be a party ; controversies between two or more States, between a state and citizens of another state ; between citizens of different states, between citizens of the same state, claiming lands under grants of different states ; and between a state or the citizens thereof and foreign states, citizens and subjects."—In no case have the federal courts jurisdiction of any cause between citizens of the same state, except where they claim title to land under grants from different states. Nor is it extended to any of the cases enumerated, exclusively, unless by construction.

By the law of congress, entitled an act to establish the judicial court of the United States—

SECT. 13. "The supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party ; except between a state and its citizens, except, also, between a state and citizens of other states, or aliens ; in which latter case, it shall have original, but not exclusive jurisdiction. And shall have exclusively all such jurisdiction, of suits or proceedings against ambassadors or other public ministers or their domestics, &c. as a court of law can have or exercise, consistently with the law of nations ; and original but not exclusive jurisdiction of all suits brought by ambassadors, public ministers, consuls," &c.

By this act, the supreme court is declared to have exclusive jurisdiction, only in three cases, viz. in controversies of a civil nature, between the United States and a particular state—and between particular states—and where ambassadors and public ministers, consuls, &c. shall be sued or prosecuted.

By section 11th, it is enacted that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law, or in equity ; where the matter in dispute exceeds in value the sum of five hundred dollars, exclusive of cost, and the United States are plaintiffs or petitioners ; or an alien is a party, or the suit is between a citizen of the state in which it is brought, and a citizen of another state.—This act declares the cognizance of the circuit courts in all the cases, therein enumerated to be concurrent with the jurisdiction of the state courts.

All concurrent jurisdictions have equal power and authority, and when either jurisdiction is applied to for justice in the regular course of law, it may not shrink from its duty and refuse to exercise the power by law vested in it.

In Sect. 12th, it is enacted, " That if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought, against a citizen of another state ; and the matter in dispute exceeds in value the sum of five hundred dollars, exclusive of cost, &c. and the defendant shall at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial, into the next circuit court, to be held in that district, and offer good and sufficient surety, for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if originally requisite ; it shall then be the duty of the state court to accept the surety and proceed no further in the cause."

Does not this provision take from the state court, a cause, of which by the constitution of the United States and by the constitution and laws of the particular states, it hath original and plenary jurisdiction, and carry it to the circuit court which has only a concurrent jurisdiction with the state court ? From all which, it is clear, that the circuit court have concur-

rent jurisdiction with the state courts, in all causes between citizens of different states, &c. but no jurisdiction of causes between citizens of the same state, except where title of land is claimed by grants from different states. It is also clear, that the state courts have original, plenary jurisdiction of all causes between the citizens of their respective states and the citizens of other states, and foreigners, concurrent with the circuit court, and exclusive jurisdiction of all causes between the citizens of their respective states, except where the title to land is derived from grants of different states.

Whenever therefore it happens that a suit is instituted by a citizen, before a court of the state to which he belongs, jointly against a citizen of the same state and a citizen of another state, the state court only hath competent jurisdiction to try it. Besides, the reason why the federal courts had jurisdiction given them of causes between citizens of different states concurrent with the state courts, was to avoid all suspicion of partiality. But in this case that reason fails.

Ezra Holcomb and John Gillet *vers.* Nathaniel Gillet.

Where a testator covenants not to alter his will, which is in favor of a son, and afterwards doth make an alteration to the prejudice of a third person, chancery will give relief.

PETITION in chancery, shewing, that in April 1773, said Ezra Holcomb was married to Phebe Gillet, daughter of Nathaniel Gillet, late of Simsbury, deceased. That he owned a farm lying, partly in said Simsbury and partly in Granville, worth £600. That said John was son of said Nathaniel, and lived with him, improved his farm, and supported him and his wife; the parents being old and unable to provide for themselves. That said Nathaniel, the father, on the 24th of April 1773, made his will, by which he gave a third of his estate to his wife for her life; and after giving fundry legacies, he gave to his son John, all the rest and residue of his real and personal estate, viz. all his lands in the wedge of land, and his dwelling house and barn, with all his movable estate, not before disposed of, and appointed said John his

executor. That in April A. D. 1781, said Ezra and John proposed to make an exchange of their interests and situations, viz. said Ezra to exchange his farm for what said John had given to him by his father's will, and said Ezra to take care of the old people; and in order that said agreement might be effectually carried into execution, it was necessary to have the consent and confirmation of said Nathaniel, the father; accordingly upon application to him, informing him of said proposed agreement, he was well pleased with it; and thereupon made and executed the following writing, viz. "April 9th, 1781. This
" may certify all whom it may concern, That where-
" as my son, John Gillet, to whom I gave in my will
" all my real and personal estate after my decease, to
" him and his heirs forever, besides the legacies that
" I have ordered to be paid out; and whereas the said
" John Gillet, hath by his agreement with my son-in-
" law, Ezra Holcomb and my daughter Phebe Hol-
" comb, to let them and their heirs have all his said
" Gillet's said right and title of my last will, I do
" hereby agree that I do consent to my son John Gil-
" let's covenant and agreement with said Holcomb,
" and that I will agree never to alter my said will that
" now stands to my son John, unless I shall be driven
" to necessity for my comfortable support, then I will
" dispose of my lands or estate as I shall think proper:
" Witness my hand, Nathaniel Gillet."

Whereupon said Ezra, by deed dated 12th of April 1781, conveyed to said John his farm lying partly in Simsbury and partly in Granville; and said John by deed of same date conveyed to said Ezra all the estate given to him by his father's said will, which the testator had agreed not to alter. And accordingly each entered into possession of the respective premises, deeded to them as aforesaid, by the other. That said Ezra supported and maintained said parents until a little before the said Nathaniel's death, when the said Nathaniel Gillet, jun. craftily enticed away his father; the said Nathaniel, sen. and knowing of all the mat-

ters aforesaid, did with design to defraud the petitioners of the estate given by will to said John and by him conveyed to said Ezra as aforesaid, persuade said Nathaniel, sen. that he had been ill used by the petitioners; and that he was not well supported, and that in case he the said Nathaniel, jun. could have the estate, he would do much better by him; and by such false and groundless suggestions, irritated his mind against the petitioners, and prevailed upon his father to alter his said will, and by a new will, revoking the former, to give to him the said Nathaniel, jun. the whole of the real estate given to said John by said former will; which will was dated the 23d of May A. D. 1783, whereby said Ezra lost his farm aforesaid, and said John had become liable upon his covenants of warranty. Praying that the court would inquire into the facts and order and decree that said Nathaniel, jun. the respondent, release to the said John or to the said Ezra all the right and title he had derived by said last will of his father to the lands and real estate given to said John, by said former will. To this petition, a plea in abatement was given, that the petition contained no proper grounds for the interposition of a court of chancery.

Judgment—That the plea in abatement was insufficient.

By the court—Ezra Holcomb is a purchaser for valuable consideration upon the faith and solemn agreement of the testator that he would not alter his will, which was in favor of his son John. Nathaniel, jun. is a volunteer, who with full notice of all said transactions, persuades the testator, by false suggestions, to alter his former will and to give said estate to him. These facts being true, shews him to have been guilty of a great fraud, and that in equity he is holden to make good his father's agreement, and to convey the estate to said John, or the said Ezra.

At the adjourned superior court, holden on the 4th Tuesday of November, 1796, this petition was heard upon the merits and granted; and a decree passed,

that said Nathaniel should release said land to said Ezra, under a penalty.

State *vers.* Richard Doan.

INDICTMENT for murder. After verdict of the jury finding the prisoner guilty, the counsel for the prisoner moved in arrest of judgment—That Elisha Williams, one of the jurors who was of the pannel that tried the prisoner, was not at the time of said trial a freeholder, possessed of real estate rated in the common list at nine dollars or more.

It is not necessary to the qualifications of a juryman, that his estate be actually rated or put into the list.

The attorney for the state replied—That the said Elisha was a talisman returned by the sheriff, and that at the time of his being returned, and at the time of said trial, he was a freeholder possessed in his own right of real estate, ratable in the common list at more than nine dollars, (viz. of a dwelling house having three smokes, or fire places and two and a half acres of pasture land.) The counsel for the prisoner demurred to the reply.

Judgment—That the reply was sufficient, and the motion insufficient.

By the court—This sum is the rule given by law to ascertain the quantity of estate requisite to qualify a juryman—but it doth not mean to make it a requisite that it be actually rated or put into the common list.

Frederick Bull *vers.* Simeon Royce.

ACTION of account for the time the defendant was bailiff and receiver to the plaintiff, viz. from the 1st of January 1794, to the 1st of January 1795, declaring that the plaintiff and defendant were in partnership in the business of driving horses, hackney coaches, and carriages, and to share equally in the profits; said Bull to find the horses and carriages, and the defendant to keep and drive them. In the

In an action of account a verdict finding that the defendant was bailiff and receiver for a part of the time stated in the declaration, is good.

WINDHAM COUNTY,

prosecution of which business the defendant received large sums of money to account to the plaintiff for the one half, &c.

The defendant plead, that he was never bailiff and receiver to the plaintiff in manner and form, &c. Issue to the jury.

The jury found the following verdict, viz.—In this case the jury find that the defendant was bailiff and receiver of the plaintiff a part of the year A. D. 1794, and that he do account.

A motion in arrest was made by the defendant for the uncertainty of the verdict, because it did not find what part of the year the defendant was bailiff and receiver.

The cause was continued to advise. At the adjourned superior court, November 1796, the motion in arrest was adjudged to be insufficient.

By the court—The jury have found that the defendant was bailiff and receiver of the plaintiff in the year A. D. 1794. The words *a part of*, may be rejected as surplusage. If the defendant was bailiff and receiver of any part of the time within the declaration, he is accountable for such part;—and though the jury have not precisely found how great a part of the year A. D. 1794, he was bailiff and receiver, yet that may be ascertained by the auditors, as well as the sum for which he is accountable.

Windham County, Sept. Term, A. D. 1796.

Gallup *vers.* Fish.

A new trial granted on the ground of new PETITION for a new trial in an action of ejectment for a piece of land, brought by said Fish against said Gallup, in which the plaintiff recovered

the land—stating that the plaintiff's title was under a survey made to John Banister, of a large tract of land beginning at two white oak trees in Fish's brook, and thence running eastward, &c. That the defendant's lot bounded north on said Banister's south line, and that the question was about the course of the line of Banister's land—whether it run due east, or east bearing some degrees south; and alledging that since said trial, he had discovered new evidence which did determine what the course of said line was and ought to be adjudged, viz. a record of an action of partition and judgment thereon, in this court in A. D. 1750, between Samuel Banister, William Bowen and wife, John Gallup and the proprietors of the common land in Voluntown, and said John Banister under whom the plaintiff claimed, and a partition made and returned by the sheriff, in pursuance of said judgment, by which it appeared, that the south line of said John Banister's lot was a due east line, which evinced most clearly that the land in controversy belonged to the petitioner.

discovered evidence, arising out of a copy of a record, which was laid in by the plaintiff at the trial.

The respondent plead in abatement—1st, That the petition contained no sufficient reasons for a new trial—2d, That the record and judgment referred to, was a public record and with due diligence might have been discovered before said trial—3d, That said record and judgment was produced by the respondent in said former trial, and was a material exhibit to make out his title and was delivered to the jury with said cause.

The petitioner replied, that a copy of said action and judgment was produced by the plaintiff as one of the mean conveyances to bring down the title from said Banister to the plaintiff, but it being conceded by the petitioner, that the respondent had all Banister's right, it was laid in upon said trial and went to the jury, but was never read in court, nor any use made of it for the purpose of settling the bounds or line; nor had the petitioner the least idea that any evidence could be derived from it, respecting the course of said line.



WINDHAM COUNTY,

The respondent demurred—and judgment that the reply was sufficient.

By the court—This partition was an ancient transaction, and it is nothing strange, that the petitioner should have been ignorant of it ; and though produced by the plaintiff as one link in the chain of his title, which was admitted by the petitioner, without any idea that it furnished any evidence as to the bounds and line, it passed sub silentio to the jury, and as much out of his knowledge as if it had not been produced ; but it must have been in the knowledge of the respondent. The court heard the petition on the merits, and granted a new trial.

Daniel Loomis *vers.* Elijah Simons.

A question to what company a soldier belongs and ought to do duty in, is of military cognizance, and determinable by the officers of the militia.

ACTION of trespass and false imprisonment—declaring, that on the 23d day of November 1793, the defendant being captain of a grenadier company, in Hampton, issued two warrants against sundry persons, for military delinquencies, and by mistake inserted the plaintiff's name in each of them, with nine shillings annexed to his name, in each, and directed them to Nathaniel Fuller, orderly sergeant, of said company, commanding him to levy and collect said sums of the plaintiff ; and said Fuller having received said warrants, levied them on the body of the plaintiff, and him unlawfully imprisoned on the 15th of January A. D. 1794, in the common gaol, in Windham, for the space of twenty-four hours, and until he paid large sums to obtain his liberty ; when in fact the plaintiff did not belong to said grenadier company, of which the defendant was captain ; but to the company of militia in said Hampton, commanded by captain Utly ; all which the defendant well knew.

To this action the defendant plead in bar, that the commanding officer of the 5th regiment, pursuant to an act of the general assembly, gave orders to the defendant to raise a company of grenadiers in said

Hampton, by inlistment ; that the plaintiff voluntarily inlisted into said company, by subscribing his name ; and said company was established ; and the defendant was chosen and appointed captain of said company, and the plaintiff from the first organization of said company to the 1st of October 1793, had constantly done duty in it. That the plaintiff was legally warned to appear completely equipt, on the 4th of October 1793, and on the 7th of said October, being days of review, neglected to appear on both of said days, and perform his duty, for which the defendant being captain of said company, inflicted a fine of nine shillings, per diem, for his delinquency aforesaid, and gave notice thereof to the plaintiff, that he might make application to the lieutenant colonel commandant, to get excused from said fines—but the plaintiff wholly neglected to make such application, and thereupon the defendant issued his warrants, directed to his orderly sergeant aforesaid to collect said fines, by force of which, said orderly sergeant for want of monies and estate, levied said warrants on the body of the plaintiff, and him committed to gaol, until he paid said fines and the legal cost—and as to any other assaulting and imprisoning, the plaintiff said he was not guilty.

The plaintiff replied and admitted, that the defendant had orders to raise said company, and that the plaintiff did subscribe his name to said inlistment ; and that the defendant was captain of said company, and that he was warned to do duty in his said company on said days, and neglected to appear, &c. yet he said that before and at the time of subscribing his name to said inlistment, he belonged to the company of militia in said Hampton, commanded by captain Utly, which did not at that time consist of more than sixty four rank and file, and that said inlistment was void ; and that he had ever since been holden to do duty in said company of militia under captain Utly.

To this reply the defendant demurred. And judgment—That the plaintiff's reply was insufficient.

By the court—The question in this case is, whether the captain is liable. The law has divided the executive government into distinct and different departments, and assigned to the jurisdiction of each, certain causes and matters proper for their cognizance. As all maritime causes are determinable in the admiralty courts; all chancery matters in the courts of chancery; all spiritual causes in the courts of ecclesiastical jurisdiction; and all military questions and matters, by the officers and courts established from among the militia. And the courts of common law take cognizance of all civil causes, and crimes committed against the peace and laws of the state. And the jurisdiction of the superior court spreads over the state and over all other courts of peculiar jurisdiction, to superintend them, and to keep them within their proper limits and bounds, to prevent their interfering with one another or their encroaching upon the common law courts. But hath no right to interfere in any causes or questions proper for the other courts to determine. A captain hath the same legal authority to inflict a fine for neglect of duty in any of his soldiers, as a justice of the peace has to fine a man for getting drunk or breaking the peace; and the soldier may appeal to the lieutenant-colonel commandant, for redress; but if he does not, the judgment of the captain is final; and unless it appears he has abused the authority given him and acted corruptly, no action lies against him.

The question is altogether of military cognizance, viz. to which of said companies the plaintiff belonged; and in which, by law, he ought to do duty; this is determinable by the officers of the militia.

David Manwaring *vers.* Jonathan Harris of Boston.

A petition in chancery which is conversant about the title of land, may be **P**ETITION in chancery, shewing, that on the 7th of September, 1793, Abner Loomis of Alhford, in the county of Windham, was indebted to said Jonathan Harris of Boston, in the state of

Massachusetts, £140; and to secure the payment, gave him a deed of a piece of land in said Ashford, and took from said Harris a writing counting upon said deed and the consideration, and therein promising and engaging to deliver up said land upon said debt's being paid, and the interest, within three months. Both said deed and defeasance were dated the 7th of September, 1793. That said Abner Loomis was also indebted to the petitioner by note, dated the 25th of July, A. D. 1794, the sum of £82-2-1; and that he attached said land, and recovered judgment on said note before the county court holden at Windham on the 3d Tuesday of August 1794, against said Loomis, for the sum of £82-2-7 debt and cost—that he took out execution on said judgment, and on the 6th of October 1794, caused said execution to be levied on said land, and had the same appraised and set off to him thereon, according to law, for payment of said debt. That on the 29th of April 1795, he offered and tendered to said Harris, five hundred and thirteen dollars, which was in full of the debt due from said Loomis, and the interest to that time; which he refused to accept, pretending that said deed to him was an absolute deed, and that the petitioner was ready to pay said debt to said Harris—praying that upon the petitioner's paying or tendering to said Harris said sum of five hundred and thirteen dollars, or the sum which should be found by the court to be due, that said Harris be compelled to release to him all the right, title and interest, he had to said lands, by force of said deed from said Loomis.

brought in the county where the land lies, though neither of the parties reside within the county.

Plea in abatement—that neither of the parties to this petition dwelt or resided in the county of Windham—and that the superior court sitting in the county of Windham, had not jurisdiction of said petition, but that it ought to have been brought to the superior court in the county of New-London, where the petitioner belonged.

Demurrer to the plea. And judgment—That the plea in abatement was insufficient.

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WINDHAM COUNTY,

By the court—The land about which the petition is conversant, lies in the county of Windham, and it is best to square the proceedings in chancery as near to the rules which regulate the common law courts as may be ; and by the statute, all causes for the trial of the title of land, shall be brought in the county in which the land lies.

Cargel, Malbone, &c. Committee of the School Society, formed within the limits of the first ecclesiastical society in Pomfret, and the rest of the inhabitants of said School society *vers.* Seth Grofvenor and others, committee of said first Ecclesiastical society.

The school monies belong to the school societies composed of all denominations residing and dwelling within the parochial limits of said societies.

ACTION of account, for certain notes and interest, and for the monies received, and that was still due upon them, which was granted to the first ecclesiastical society in Pomfret, by the general assembly, in A. D. 1733, to be appropriated to the use of schools only, and received by the committee of said society in A. D. 1741.

Plea—that the defendants were never bailiffs and receivers of the plaintiffs' monies, &c. in manner and form, &c. Issue to the jury.

The jury found that the defendants were bailiffs and receivers of the monies, &c. of the plaintiffs, in manner and form, &c. and that the defendants do account—which verdict the court accepted for the following reasons, viz. The general assembly in May A. D. 1733, ordered that the seven western townships should be sold, and granted the money arising from the sale, to the several towns and parishes, which made and composed lists in A. D. 1732 ; the interest to be applied to the support of schools in such towns and parishes of which the first society in Pomfret was one, who by their committee in A. D. 1741 received their proportion of the bonds and money aforesaid.

In January A. D. 1792, by far the greater part of said first society in Pomfret, dissented from said ecclesiastical society, and formed themselves into a church or society, by the name of the Catholic Reformed Christian Church and Congregation, and settled a minister amongst them. The rest of the inhabitants which remained being the First Ecclesiastical Society claimed to hold the school monies exclusively, of those who dissented from them.

By the last paragraph of the law, entitled an act securing equal rights and privileges to Christians of every denomination in the state, which was made and passed at the general assembly, in October A. D. 1791, it is enacted, "and every person claiming the benefit of this act, shall be disqualified to vote in any meeting of such society, save only in matters which relate to the maintenance and support of schools,"—by which the dissenters are considered as members of the established society, for the purpose of supporting schools, and entitled to their proportion of the school money.

The act made and passed in May A. D. 1795, entitled an act appropriating the monies which should arise on the sale of the western lands belonging to this state, directs, that the interest arising upon said monies, shall and is thereby appropriated to the support of schools in the several societies constituted, or which may be constituted by law, within certain local bounds in this state, to be kept according to the provisions of law, which shall from time to time be made; and to no other use or purpose whatsoever, except in the case and under the circumstances therein after mentioned. And that said interest as it shall become due from time to time, be paid over to the said societies, in the capacity of school societies, according to the list of polls and ratable estate of such societies respectively; which shall, when such payment shall be made, have been last perfected. Said act also further provides, that whenever such society shall pursuant to a vote of such society, passed in a legal meeting warned for that purpose only, in which vote two thirds of the legal voters present in said meeting shall concur, apply to

the general assembly requesting liberty to improve their proportion of said interest, or any part thereof, for the support of the Christian ministry, or the public worship of God, the general assembly shall have full power to grant such request, during their pleasure; and in case of any such grant, the school society shall pay over the amount so granted, to the religious societies, churches, or congregations, of all denominations of Christians within its limits, to be proportioned to such societies, churches or congregations, according to the list of their respective inhabitants or members, which shall, when such payment from time to time be made, have been last perfected; and in case there shall be in such school society any individuals composing a part only of any such religious society, church or congregation, then the proportion of such individuals shall be paid to the order of the body to which they belong, by the rule aforesaid; and the monies of such individuals shall be discounted from their ministerial taxes or contributions, and in that way enure to their benefit, &c.

And it is further enacted, that all the inhabitants living within the limits of the located societies, who by law have right to vote in town meetings, shall meet some time in October annually, in the way and manner prescribed in the statute, entitled an act for forming, ordering and regulating societies; and being so met, shall exercise the powers given in and by said act, in organizing themselves, and in appointing the necessary officers, as therein directed for the year ensuing; and may transact any other business on the subject of schooling in general; and touching the monies hereby appropriated to their use in particular, according to law; and shall have power to adjourn, &c.

Here is a new corporation or school society constituted to consist of all the legal voters in town meetings, living within the parochial limits of the ecclesiastical society, including all denominations, which is to regulate the business of schooling and the expenditures of said interest, being the persons to whom the interest is granted. The inhabitants legal voters in

town meeting, living within the limits of said first ecclesiastical society in Pomfret, agreeably to the law, met in the month of October A. D. 1795, formed and organized themselves as is therein provided; chose their officers and appointed agents to call the defendants to account for said school monies. And the question is, whether the committee of the first ecclesiastical society in said Pomfret, are accountable for the school monies they have received from the grants of the general assembly aforesaid, to the school society, erected and constituted as aforesaid?

It is clear that they are; and that upon three grounds—1st, They are all inhabitants of said first ecclesiastical society living and residing within its local limits, and to whom the grants were made—2d, The interest granted was the common interest of all the inhabitants indiscriminately, without regard to religious distinctions, and is drawn upon the aggregate list of all the inhabitants—3d, It is for the general benefit of the public, that the children of all the citizens, without distinction, should receive an education; and it is evident from the laws upon the subject, that this was the liberal intention of the legislature in making the grant.

New-London County, Sept. Term, A. D. 1796.

William Nickols *vers.* Thomas Giles.

WILLIAM NICKOLS exhibited his motion for a habeas corpus to take a daughter of his, about three years old, from one Thomas Giles, who as he said, unjustly detained and withheld her from him, and unlawfully imprisoned her; and also to bring said Giles, before this court to shew reason why he thus detained and imprisoned his daughter, &c.—Upon inquiry it appeared that the child was with its mother, who lived with her father the said

The court will not grant a habeas corpus in favor of a father, to take a daughter from her mother, who lives with her father, and the child is well taken care

of, and not likely to be so by the father.

Thomas Giles ; that the child was well provided for ; and said Nickols having no house and very little property, and very irregular in his temper and life, his wife had left him and went and lived with her father, where both she and her child were well provided for. Upon which the court refused to grant said writ.

Joseph Williams vers. Joseph Perry.

Oyer must be given of the records of the superior court, when required.

ACTION of debt, declaring upon a judgment of the superior court, rendered in March A. D. 1794.

The defendant prayed oyer of the record. The plaintiff would have excused himself from giving oyer, because the record was of this court.

But, by the court—Although in England where the records of the king's bench are kept in the place where the court sats, a proferit may not be necessary to be laid in the declaration, because the record is already in court, to which the defendant has equal access with the plaintiff ; yet in this state the records are not kept in the place where the court sats, nor can they be transported round the circuit. Copies or exemplifications must be taken and improved in trials ; and it is the duty of the party who would take benefit by them, to produce them in court, whenever oyer is prayed of them.

Joseph Perkins and Lydia Lothrop vers. Joseph Williams.

Executors appointed and qualified in a foreign jurisdiction, may not prosecute actions in this state, until qualified according to the laws here.

ACTION of indebitatus assumpsit, declaring that on the 23d of August A. D. 1792, the defendant by authority from the plaintiffs, and for their use, received £500 of George Phillips, &c. insurance company at Middletown ; which was due and owing from said company to Elisha Lothrop late of Norwich, deceased, of whose last will the plaintiffs were executors, and legally entitled to said money—that the defendant thereupon be came indebted and liable to

pay said money to the plaintiffs, with the lawful interest, and in consideration thereof, the defendant on the 1st of May A. D. 1795, assumed and promised to pay the plaintiffs said sum of £500 and the lawful interest, in a reasonable time, &c. which he had never performed.

Plea in abatement—That it appeared by the last will of said Elisha, shewn on oyer, that John Luke and Jesse Breed of Norwich, in New-London county, both residing in Essequibo in Demerara, at the date of said will, were appointed joint executors with the plaintiffs, and ought to have been joined in this suit. That said Elisha died at Essequibo in Demerara, in A. D. 1790, soon after executing said will; which was proved and approved according to the laws of the colony of Demerara; and said Luke and Breed accepted said trust of executors there, before the date of the plaintiffs' writ, and said Breed was resident at Norwich, and said Luke in said Demerara, before and at the date of said writ.

The plaintiffs replied, that although said Breed and Luke were appointed joint executors with the plaintiffs by said will, yet that said Luke and Breed, had never accepted said trust, nor qualified themselves to act as executors, before any court in this or the United States; nor given bond as the law required.

¶ The defendant demurred to the plaintiffs' reply. And judgment—That the plaintiffs' reply was sufficient.

By the court—It appears that although said money was due to the testator, and that the plaintiffs derived their right originally from the will; yet as the defendant recovered the money by their order since the decease of said testator, he is accountable to them for it.

Further, Demerara is a foreign jurisdiction; said Luke and Breed's accepting the trust, and qualifying themselves to act as executors, according to the laws of that country, does not qualify them to act as such in this jurisdiction, which may require very different

qualifications. Besides, it would be impolitic, and tend to great injustice, if an executor or administrator in a foreign jurisdiction, might collect all the debts and effects of the deceased here, and carry them away to the prejudice of the creditors in this jurisdiction; which no wise or just government would permit to be done to the prejudice of its own citizens.

Nathan Williams, administrator of William Williams, deceased *vers.* Frederick Smith and Amos Porter.

Where the consideration of a note is an obligation to give a deed of certain lands, which becomes impossible by the act of God, chancery will grant relief if the obligor is bankrupt.

PETITION in chancery, shewing that on the 22d day of April A. D. 1773, the said William contracted with said Frederick and his wife Elizabeth, she then being a minor, under the age of twenty one years, for a certain tract of land, described in the petition, for which he agreed to give £62-14, and as a title could not be given of said land, until said Elizabeth arrived of age, the said Frederick executed an obligatory writing, that he and his said wife Elizabeth, would give a deed of said land when she should come of age, which was signed by said Frederick and his wife. And the said William to secure the payment of said purchase money, gave three notes, one for £24-12 lawful money, payable in two years, one for £24-12 payable in three years, and one for £13-10, all payable with interest after they should become due. That said Elizabeth died before any deed was given of said land, and said land descended to her heirs at law; that said William Williams was also dead, and no deed had ever been given of said land, nor could any ever be obtained; that said notes ought to be given up or cancelled; and that said Frederick had removed out of the state, and become bankrupt, and had assigned said notes to Amos Porter of Lebanon, who had recovered judgment upon one of them for £50 damages and his cost; and had put another of them in suit, and the petitioner had no defence against said notes at law; and said Porter the assignee had notice of the circumstances of said notes before the

assignment. And both he and said Frederick refused to deliver up said notes—praying for a perpetual injunction to be laid on said judgment, suit and notes, or that they be offset against said obligation for a deed of said land.

Plea in abatement—that said petition contained no sufficient grounds for the interposition of a court of chancery.

The petitioner contended that these notes were subject to the same equity in the hands of the assignee, as in the hands of the original promisee, and that that was the case of all securities for money, except negotiable notes and bills of exchange, which in favor to commerce were not; and cited 2 Vern. 692 and 764—Douglas 636, Peacock *vs.* Rhodes, and Powell on Contracts, 77. And that in this case the condition of the bond had become impossible by the act of God. The law laid down in those authorities was not questioned by the respondents, but they contended that this case did not come within them. If a note should be obtained by fraud or duress, &c. the assignment will not purge it—or if it was originally defeasible, an assignment will not affect the defeasance. It was also contended by the respondents that here the obligation for a deed, and the notes were mutual independent securities, one being the consideration of the other, and that the failure of performing the one, did not defeat the other; but drove the petitioner to his proper legal remedy upon his security; as in the case of a deed with covenants of seisin and warranty, the covenantee cannot offset his notes against the covenants, because the covenantor was not seised; but must resort to his legal remedy on the covenants, which the party had right to have tried at law, viz. whether he was seised or not; but more especially where the notes were assigned to a third person—and so in this case if the said Smith was a bankrupt, and there was likely to be a loss, it was more equitable that it should fall upon the original promisor, who first trusted him, than upon an innocent endorsee, who

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trusted, not upon the credit of the endorser, so much as upon that of the promisor.

Judgment—That the plea in abatement was insufficient. The petition was heard upon the merits and granted.

Clement vers. Wheeler.

The guardian is bound by the covenants in an indenture entered into by the minor, with the guardian's consent.

ERROR to reverse a judgment of the county court, in an action brought by said Clement before a justice of the peace, against said Wheeler—declaring, that on the 15th of April A. D. 1793, Joseph Wheeler, son of the defendant, a minor about eighteen years of age, by an indenture bound himself an apprentice to the plaintiff, with the consent of the defendant, his father and natural guardian, until he should arrive to the age of twenty one years, which would be on the 25th of December 1795, to learn the trade of a hatter ; and covenanted faithfully to serve the plaintiff during said period in the usual form ; and the plaintiff on his part covenanted to provide for said Joseph, to learn him said trade, &c. &c. which indentures were signed by said Joseph and the defendant ; and alledging that the plaintiff had performed on his part, and that the said Joseph in direct violation of the covenants in said indenture, did on or about the 20th of June last, depart from the house and service of the plaintiff, contrary to his mind and will, and continued to absent himself for the space of two months, to his damage £4—writ dated 29th August 1794.

This cause was appealed to the county court ; and the defendant plead in bar, that on the 20th of said June, said Joseph, with the consent of the plaintiff, went a voyage to Boston, with captain Harris, and was gone five weeks ; and that his wages were paid to the plaintiff's order—and that said Joseph returned to, and was received by the plaintiff into his service and business ; and that a short time before the date of the plaintiff's writ, the plaintiff and said Joseph differed about some matters, on account of which the said Joseph left the plaintiff.

The plaintiff replied, that said Joseph left his service on the 20th of said June, against the plaintiff's express prohibition, and never after had returned, except one day to get his clothes, which he had pledged for his wages; without that, that said Joseph went away on said 20th of June, with the consent of the plaintiff, with said capt. Harris, to Boston, and that the plaintiff received his said Joseph's wages, in manner and form, &c.

To this reply the defendant demurred, and the judgment of the county court was that the reply was insufficient and that the defendant recover his cost.

Error assigned, that the county court ought to have adjudged said reply sufficient, and given judgment for the plaintiff to recover.

Plea—nothing erroneous. And the judgment of this court, that there is manifest error in the judgment complained of.

By the court—The principal question in this case is, whether the father or guardian is bound by the covenants entered into by the minor, with the father's or guardian's consent? By the statute of this state no person under the government of a parent, guardian, &c. is capable of making any contract which is valid in the law, without the consent of such parent, guardian, &c. in which case, such parent, guardian, &c. shall be bound thereby. And every servant and apprentice of more than fifteen years of age, who shall abscond from their master's service before their term of service is expired, shall serve treble the time of their being absent. And it has been repeatedly adjudged upon the last mentioned paragraph of the law, that, on indentures, where the guardian covenanted for the apprentice, that he should serve, &c. although the master might take his remedy against the apprentice, for the treble service, yet he is not obliged to; and that an action well lies against the guardian on the covenants. Are the covenants in this indenture, formally entered into by the minor, with the consent of the father and guardian, only binding upon the

NEW-LONDON COUNTY,

minor, or are they binding upon the father? They are binding upon the father, the same as though he had expressly made them; and subject him to damages for a breach. They are also binding upon the apprentice and make him liable to the treble service only.

Frances Siftare, widow of Gabriel Siftare *vers.*
Joseph Siftare, executor of said Gabriel Siftare.

The widow of a foreigner who was naturalized who arrived and died in this State, she ever remaining absent from her husband in a foreign country against his consent, is not entitled to dower in his estate.

APPEAL from the order of the court of probate in negating her application for dower, and assigned for reasons—1st, That at the time of the said Gabriel's decease, she was the lawful wife of the said Gabriel, and had right by law to be endowed of the use and improvement of one third part of all the real estate of which he died seised and possessed in his own right in fee, for and during the term of her natural life, being in value about £5,000 lawful money, lying in the district of New-London.

The appellee replied, that said Gabriel was a natural born subject of the king and kingdom of Spain, residing and dwelling in Barcelona, until October 1770, when in a voyage at sea, he was providentially brought into said New-London; which he soon after determined to make the place of his abode, and provided a vessel and five hundred dollars in cash, and in January 1771, sent to said Barcelona, in the kingdom of Spain, after the said Frances, she then being his lawful wife; and made her acquainted with his determination to settle at said New-London, and requested her to come over and cohabit with him at said New-London; which she utterly refused to do; and ever since had continued to reside in Barcelona in the kingdom of Spain, and to absent herself from her said husband through her own default and not his; and that she was a natural born subject of the king and kingdom of Spain, and was an alien and could not by law take or inherit any freehold estate.

The appellant rejoined, and admitted that she was invited by her said husband to come to New-London, and dwell with him; but the said Gabriel having soon after his arrival at said New-London, taken to his bed and board another woman, with whom he lived until his death, and by whom he had several children—and that said Frances remaining in Spain absent from said Gabriel, was through his default and not her's. That said Gabriel was naturalized by an act of the general assembly of the state of Connecticut, and was a citizen of said state, at the time of the declaration of independence, and ever after continued such until his death, which happened on the first of January A. D. 1794—whereby she became and was at the time of said Gabriel's death, entitled to the rights of a citizen of Connecticut, without that, that her abiding in Spain absent from her said husband, was through her default.

Appellee affirmed over his reply to the reasons of the appellant. Issue to the court. Case continued to advise.

March Term 1797—the court found that the said Frances abiding in the kingdom of Spain, absent from her husband, was through her default; and the judgment of the court of probate was affirmed, for the following reasons, viz. The statute is, that every married woman living with her husband in this state, or absent elsewhere from him with his consent, or through his mere default, or by inevitable providence, &c. who shall not before marriage be estated by way of jointure, in houses and lands, &c. for term of her life, shall immediately upon and after the death of her husband, have right, title, and interest, by way of dower, to one third part of her deceased husband's estate, in houses, lands, &c. which he stood possessed of at the time of his decease, during her natural life. The appellant remained in the kingdom of Spain, absent from her husband the said Gabriel, through her own default; and is not by the statute entitled to dower in her said husband's estate.

Joseph Williams *vers.* Andrew Perkins, &c. ex-
ecutors of Elisha Lothrop, deceased.

Creditors to
an insolvent es-
tate are conclu-
ded by the com-
missioners' dis-
allowing their
claims.

APPEAL from a judgment of the court of pro-
bate, accepting a return of commissioners on
said Elisha's estate, for the following reasons, viz.
said Elisha Lothrop's estate was represented insol-
vent, and commissioners appointed to examine and re-
port the debts due from his estate, to whom said
Williams exhibited an account against said Elisha, as
his agent in Demerara, in the West-Indies, from A.
D. 1785, to A. D. 1788 ; in which was stated to be
due to the appellant, 14,057 guilders, equal to 5,602
dollars, when the outstanding debts should be collect-
ed by him there, which was stated under the hand of
said Elisha. That from said 1788 to the 12th of May
1791, said Elisha and John Luke, were joint agents
for the appellant in said Demerara, and that in said
time they paid on said Elisha's account 10,079 guild-
ers, fourteen stivers ; and they rendered their account
of their joint agency amounting to 54,523 guilders,
excepting bad and outstanding debts ; that upon said
Elisha's account there was due from him 14,057
guilders ; and from said company 54,523 guilders, a-
mounting in the whole to 27,411 dollars, which claims
the appellant exhibited to said commissioners ; and
said commissioners mistaking the law disallowed said
claim, on the ground that said debts ought to be col-
lected out of said Elisha's estate, and out of said Eli-
sha's and said Luke's estate jointly, in the West-Indies ;
the whole being for business transacted there as agents
for said Williams, although nominally it was done in
their own names.

The appellee replied, that the reasons were not true,
and were insufficient. On which an issue in fact and
law was joined. The appellant offered said accounts
which were exhibited to the commissioners ; also the
commissioners to prove and substantiate the truth of
his reasons.



To the admission of this evidence the appellees objected; that the evidence was irrelevant, the commissioners being by law made the sole judges of the claims of the creditors; and their doings were final and conclusive, as to all claims of creditors against an insolvent estate—although the executors, &c. may contest at common law, claims allowed by the commissioners; as also, may heirs and legatees or creditors, contest claims allowed in favour of executors or administrators by commissioners.

The court was of opinion that the evidence was not admissible for the reasons above stated. The law having been long settled to be so; and it is expressly declared by the statute, that whatsoever creditor shall not make out his or her claims with such commissioners, before the full expiration of the time set and limited for that purpose as aforesaid, such creditor shall forever after be debarred of his or her debt; unless, &c.

The appellant filed a bill of exceptions—and judgment was, that the reasons were not true.

The case of *Phelps vs. Edwards*, administrator on the estate of Benedict Arnold, is in point. 1 vol. Root's Reports, 96. The case of *Punderfon vs. Mrs. Avery*, administratrix on her husband's estate, adjudged in the superior court at New-London, in the summer circuit of A. D. 1785, and afterwards affirmed in the supreme court of errors, went upon the same principle. 1 vol. Root's Rep. 103. See also the case of *Canon vs. Abbot*, administrator of Lemuel Morehouse, adjudged at Fairfield in the winter circuit of A. D. 1791. 1 vol. Root's Reports, 251—and *Mary Williams*, administrator on the estate of Col. Nathan Whiting *vs. Executors of Thomas Darling, Esq.* 356.

This judgment, in the case of *Joseph Williams vs. Andrew Perkins, &c.* was affirmed in the supreme court of errors.

Hartford County, Nov. Term, A. D. 1796.

Frederick Bull verſ. Samuel Olcott.

Where the jury find a defendant guilty, upon a complaint of forcible entry and detainer, they must find the force, or the verdict will be bad. Upon a reversal in such case, no restitution of possession is awarded.

ERROR to reverse a judgment of two assistants in a prosecution for a forcible entry and detainer, upon the statute. In which said Bull was charged with entering by force and strong hand into certain messuages of the said Olcott's, and them detaining and holding from him with force and strong hand.

Plea—Not guilty. Issue to the jury.

The jury found that the defendant was guilty of detaining and holding said premises from the plaintiff, and thereupon judgment was rendered, that the plaintiff be re-seised and re-possessed of said premises.

Error assigned was—That the verdict was deficient, in that it had not found that the detaining and holding, was by force and strong hand, as alledged in the declaration.

Plea—Nothing erroneous. And judgment, manifest error.

By the court—It is the force that accompanies an entering or detaining, which by the statute will warrant this kind of prosecution; and it must be expressly found in order to justify a restitution of possession.

The words of the statute are, "That upon complaint made to any one or more assistants, justices, &c. of any forcible entry made into any houses or lands, &c. lying within the county where such assistant or assistants, justice, &c. dwell; or of any wrongful detainer of any such house or lands, &c. by force and strong hand; that is to say, by or with such violent words or actions as have a natural tendency to terrify and affrighten, such assistant, &c. shall go and view the place," &c. A forcible entry must be laid to be done with force and strong hand, or with menace of life, limb or some bodily hurt. Hawkins 138

and 145. And the force laid, must be found, in order to justify an award of restitution of possession; *vi et armis* is the common allegation in actions of trespass, and is not sufficient to warrant proceedings on this statute, which is designed to prevent the breaking of the public peace, and that no man who hath right of entry into houses and lands, may enter but in a peaceable manner, and if he cannot enter in that manner, he must resort to his own proper remedy, by a suit at law.

The statute further enacts, "That if it be found on such inquiry, as hath been before pointed out, that a forcible entry hath been made into houses and lands, &c. or that the same are held with force, then the justices, &c. shall cause the same to be re-seized, &c. and the party to be put into the possession thereof."

Upon the reversal of this judgment, Bull moved that the court would cause him to be restored to the possession of the messuages of which he was dispossessed, by the assistants.

By the court—The damages to which he shall be restored, are his costs, which he has paid to the adverse party, and those which he ought to have recovered in the original prosecution; but a restoration of the possession cannot be awarded in the case of forcible entry, nor in ejectment, upon a reversal of a judgment in error. *Vide Bird vs. Bird*, ante. *Litchfield*, August last.

Daniel Sheldon, &c. children and heirs of Daniel Sheldon, late of Hartford, deceased *vers.* Joseph Woodbridge, &c.

ACTION of ejectment for six-seventh parts of a tract of land, described in the declaration, which the plaintiffs claimed as children and heirs of Daniel Sheldon, deceased, in common with Lucy Woodbridge, wife of the said Joseph, who was one of the children and heirs of said Daniel, deceased;

If an administrator purchases the estate fraudulently, it is void against creditors and heirs. A motion in arrest

and a bill of exceptions must be presented within twenty-four hours after recording the verdict, exclusive of sabbath days.

and of which the plaintiffs were seised in March A. D. 1794, and afterwards disseised by the defendants.

Plea—no wrong or disseisin. **Issue** to the jury.

Daniel Sheldon died seised of this land in August A. D. 1772, and the plaintiffs claimed title to said land by descent, as heirs to their father, said Daniel.

The defendants set up title under a deed from Isaac Sheldon, administrator on the estate of said Daniel; his estate being found and adjudged to be insolvent, and said administrators in September A. D. 1776, advertised for sale about six hundred pounds lawful money worth of land belonging to the estate of said Daniel, at public auction; and sometime in November after, he gave a deed of said land, privately, to Joseph Woodbridge, of Groton, whose first wife was daughter of said Isaac, at inventory price; said deed was recorded in June A. D. 1777, and on the 9th of March A. D. 1778, said Woodbridge reconveyed said land to said Isaac, for the same consideration; this deed was not recorded until A. D. 1789, after said Isaac's death, which happened in A. D. 1786. On the 4th of April A. D. 1788, said Joseph Woodbridge gave a lease of this land to his brother William, for the term of twenty years. Said Joseph Woodbridge took administration on said Isaac's estate, and caused this land to be inventoried as said Isaac's estate; he also made and exhibited an administration account against the estate of said Daniel, and procured it to be allowed at the court of probate, which made said estate much insolvent. This land was distributed to the widow of said Isaac in dower, and the children of said Joseph by his first wife.

The plaintiffs objected against the title of the defendants; that the deed from said Isaac, administrator aforesaid to said Joseph Woodbridge, was fraudulent, evidently made in trust for his own use and benefit, and at a much less price than the true value of the land, to deprive the plaintiffs, who were then minors, of their interest—for that he took the land to himself at inventory price, when he had been offered a quarter

more for it by others, which he refused; that said Isaac never in his life time exhibited any inventory of certain lands owned in common by said Isaac and Daniel, to the value of £300 lawful money; that in said administration account, exhibited by said Woodbridge against said Daniel's estate, the rents of lands while in the hands of said Isaac, and other interests to a large amount, which came into his hands, were suppressed or but partially credited—that it also contained charges for debts against said estate which were not due or ever paid, and for services beyond what was reasonable or just, which made said estate insolvent, when in fact it was not.

The defendants objected against any evidence being admitted to prove these matters, as it would contradict the records of the court of probate. The evidence was admitted.

By the court—This account was exhibited to the court of probate, and procured to be allowed, not by the administrator on said Daniel's estate, but by Joseph Woodbridge, administrator on said Isaac's estate, who had no right to administer on said Daniel's estate, and so the proceedings at the court of probate are illegal and void. Further, had they been legal in point of jurisdiction and form, this evidence would be admissible to prove fraud in the administrator, in procuring said allowance to be made by the court of probate; this does not contradict the record nor impeach the court, but goes to evince the fraud practised by the party in procuring said allowance to be made.

Further, the power given to said administrator was to dispose of the land for the most it would sell for—this was not pursued nor executed, for the pretended sale to said Woodbridge, was a sale to himself, and for a less sum than he could have had for it; and although an administrator might in such case be a purchaser, for the benefit of creditors or heirs, yet it ought to be with the utmost fairness, as he is trustee for the benefit of the concerned, for the creditors where the

estate is insolvent, and for the heirs, where it is solvent; and he is bound as a faithful steward to make the best of the estate for their interest.

Verdict for the plaintiffs to recover, and accepted by the court.

This verdict was accepted on Saturday just before sunset, when the council for the defendants informed the court that they had a motion in arrest of judgment. About ten o'clock Tuesday morning, the defendants presented their motion in arrest, which was objected against, on account of its being too late, it being more than twenty four hours, exclusive of the sabbath, from the time said verdict was accepted and recorded. By the court—it cannot be received. On Wednesday a bill of exceptions to the opinion of the court in admitting certain testimony in said cause, pursuant to intimations given at the time was, presented, and objected against, for the same reasons offered against the motion in arrest, and by the court not received.

Samuel Bull of Middletown *versus* Caleb Bull, Sanford, Nightingale, &c.

A petition, complaining of fraud in the obtaining of a note and praying to be relieved against it on that account, must state the facts which constitute the fraud.

PETITION in chancery—shewing that on the 11th of December 1795, Samuel Bigelow, being agent as hereafter mentioned, sold to the petitioner and Arthur Magill twelve shares of land estimated at seven thousand acres each, in a certain territory pretended to have been purchased of the state of Georgia, by a company styling themselves the Georgia Mississippi Company; and as evidence of their title gave to said Bull and Magill, three several certificates of the following tenor, viz. “State of Georgia,—The Georgia Mississippi Company have purchased from said state, a certain tract of territory lying between the rivers Mississippi and Tombigby, and extends from 31 degrees 18 minutes, to 32 degrees 40 minutes north latitude, computed to be one hundred eighty miles in length and ninety-five in breadth, subject to a re-

servation of one hundred and twenty thousand acres for other citizens. The grantees of said company do hereby certify, that John C. Nightingale or his assigns, is entitled to four shares or four sixteen hundredth parts in said company, to be held agreeable to the rules and regulations prescribed under the constitution thereof.—Given under our hands at Augustine the 22d day of January A. D. 1795—N. Long, Thomas Glascock, Thomas Commings, A. Gordon, grantees—Countersigned, John Mcintosh, secretary.”—Which certificates were endorsed by said Nightingale and delivered at the time of the sale to said Bull and Magill; and for and in consideration thereof, said Magill, at the request of said Bigelow, on said 11th of December, executed notes payable to said Caleb Bull, and endorsed blank by him, and delivered to said Bigelow to the amount of 7560 dollars, being at the rate of nine cents per acre. One of said notes for 2394 dollars, was by Peleg Sanford delivered up to said Samuel Bull upon his paying 1563 dollars and executing a note on the 14th of January A. D. 1796, to said Caleb Bull for 831 dollars, payable in sixty days at Hartford bank, and endorsed by said Caleb, and delivered to said Sanford. That an action on said note was now depending in the city court in Hartford, in the name of said Caleb for the benefit of said Sanford—that in said transaction said Bigelow acted as agent for Peleg Sanford; and said Bigelow on said 11th of December A. D. 1795, gave to said Samuel Bull and Magill, a certificate that said notes were given for said shares of land; which notes said Bigelow delivered to said Sanford before the 11th of March A. D. 1796, and said Sanford gave to said Samuel Bull a receipt acknowledging that said note for 831 dollars was for one of said certificates; and that said note was endorsed by said Sanford to Chauncey Gleason and Company; and that said Sanford was concerned with and acted for said Nightingale in said transactions.

The petitioner further stated, that the original purchase of said company from the state of Georgia, was corrupt, fraudulent, and totally illegal and invalid;

HARTFORD COUNTY,

and the legislature of said Georgia had declared and determined that said original purchase and grant under which the sale aforesaid was made to said Bull, &c. was fraudulently, corruptly and illegally procured and obtained by said company, and that said grant was void; and said legislature having vacated said grant and caused the record thereof to be cancelled and destroyed.—That said Nightingale was one of the original purchasers from the state of Georgia, and acquainted with all the measures devised and pursued by said company to obtain said illegal grant; and said Sanford before and on said 11th of December 1795, well knew and understood the proceedings aforesaid, and the petitioner and said Magill were wholly ignorant, until since January A. D. 1796; since which time said grant had been condemned, vacated and annulled as aforesaid.

Further, that said tract of territory was claimed by the United States, and by order of Congress the attorney-general had investigated the title and reported that the claim was well founded, as to a considerable part of it.—That previous to said 11th of Dec. 1795, said company caused to be printed and circulated in this and the United States, a representation, that the state of Georgia unquestionably owned the land, and that said purchase was fair and bona fide, on good consideration; which representation was fraudulent and deceptive; and operated to induce the said Bull and Magill to make the purchase aforesaid; by which the petitioner was deprived of the benefit of said lands, and the consideration of said note had wholly failed,—Praying for a perpetual injunction upon said note.

To this petition a demurrer was given.—Continued to advise.

At the superior court, February term, A. D. 1797, the court gave judgment, that the petition was insufficient—and at the same court the petition of William Marsh vs. Asher Miller, &c. and James A. Wells vs. said Miller, &c. abated for the same reasons.

By the court—The allegations in the petition are, that said original purchase and grant under which the sale aforesaid was made to said Bull, &c. was fraudulently, corruptly, and illegally procured and obtained, by said company; and that said grant was void, and that said legislature of the state of Georgia, had vacated said grant, and caused the record thereof to be cancelled and destroyed.

There are no facts alledged which shew said purchase to be fraudulent, corrupt and illegal. Further, if the grant was void, there was no occasion of an exertion of legislative power to make it so; if it was not void, it was not in the power of the legislature of Georgia, who are the grantors to vacate or make void their own grant. It is necessary in cases of this nature, that the facts which constitute the fraud and corruption, should be set forth, that it may appear to the court, whether the transaction was fraudulent so as to avoid the grant or not—and also how and by what means or practices, the petitioner was imposed upon and defrauded, and drawn in to make said purchase and give said notes—what the false suggestions were, or truths suppressed and kept back, which it was the petitioners duty to have made known and disclosed to the petitioner. Fraud is an inference of law arising out of certain facts, which ought to be alledged, that they may be traversed, if they are not true.

Grant, Foster, &c. *vers.* Halkins and Reynolds.

PETITION in chancery, shewing that on the 13th of October A. D. 1792, in pursuance of a bargain and contract with Ebenezer Metcalf, the petitioners gave a bond of that date, to said Metcalf, in the penal sum of £130, conditioned to give said Metcalf a deed of a certain tract of land, described in the condition of said bond, by the 20th of November 1793; said £130 being double the price agreed upon for said land. That said Metcalf gave the petitioners two notes, one for £8, payable the first of May A. D. 1793, and one for £30, payable the 20th of Novem-

A court of chancery will not relieve against a bond for a deed of land, where the parties have mutual remedies at law, and the bond is assigned for valuable consideration without fraud or collusion.



HARTFORD COUNTY,

ber A. D. 1793, with interest, in part for the consideration of said land ; and that it was the agreement of the petitioners and said Metcalf, that said notes should be paid before said deed should be executed ; and that the petitioners on the day specified in the condition of said bond, went to the house of said Metcalf, with a deed executed according to the condition of said bond, for the purpose of delivering it to him, but he was gone from home, and that soon after said Metcalf became bankrupt and absconded out of this state ; and after he became bankrupt, and before he absconded, he assigned said bond to the petitionees, viz. on the 7th of December 1793, who at the time of said assignment had notice that said Metcalf was bankrupt, and was about to abscond ; also had notice that said notes were given for said land, and that they were wholly unpaid. That afterwards the petitionees agreed to accept a deed of said land and pay said notes, in case the petitioners would wait upon them one year, and the petitioners accordingly waited one year, and called upon them to fulfil their agreement, but they refused to perform their said agreement, and had commenced a suit on said bond to recover the penalty thereof, which was now pending before this court ; that said Metcalf was still absent and absconding, and the petitioners were without remedy at law—praying that the petitionees might be ordered to pay said notes and receive a deed of said land, and to lay an injunction on the suit at law, &c.

This petition was heard upon the merits and negatived.

By the court—The petitioners gave their bond for a deed, and took said Metcalf's notes ; they are mutual independent securities, as in case of a deed of land with covenants, of warranty, and a bond taken for the money, and the title fails, the grantee has his remedy upon the deed ; yet in such case if the grantor is bankrupt, and the title has been decided at law, a court of chancery will decree an offset. But if the bond is assigned for a valuable consideration, without notice or any fraud, equity will not compel the assignee

to give it up. In this case it appeared that the assignment of this bond was fair, and that said Metcalf did not become bankrupt; nor abscond until long after the assignment of the bond to the petitionees. Here was no suggestion of fraud in Metcalf, in making said contract, nor in the petitionees in obtaining the assignment of said bond; but the petition goes upon the ground, that unless they were paid for the land, chancery would relieve them against their bond to convey it; which will not do any more than to relieve in every case against the obligation given for lands where the title fails, and the obligor hath his remedy upon the covenants in the deed.

John Wells *vers.* Ebenezer Lindley.

ACTION of debt on judgment, declaring that before the adjourned superior court in November A. D. 1783, the plaintiff recovered a judgment against said Lindley for the sum of £200-17 damages, and £8-16-4 cost, on which he had execution for said sums—dated the 18th of March A. D. 1784. That said execution for want of estate was levied upon said Lindley's body; and that on the 21st of April A. D. 1784, he was committed to gaol. That on the 30th of said April he took the oath provided for poor prisoners, and thereupon the defendant was immediately by the keeper of said gaol permitted to depart therefrom; and that said judgment had never been paid or satisfied.

A debtor in prison on an execution, who immediately goes out of gaol on taking the poor prisoner's oath, is liable as for a voluntary escape.

The case was defaulted and heard in damages—and upon the question, whether the execution should issue in common form, or only against the defendant's estate—the court determined that this was to be considered as a voluntary escape in the defendant and in the gaoler, and the plaintiff had his election to take either; for the defendant had no right to go out of prison immediately upon taking the oath, but he was to be kept a reasonable time after taking the oath, that the

creditor might have opportunity to supply money for his support. Interest was given in damages, and execution granted in common form.

Middlesex County, December Term, A. D. 1796.

Paddock vers. Higgins.

The guardian is bound by covenants entered into by his ward, by his advice and consent. An obligation being lost by inevitable accident, a good excuse for not producing it on oyer—by the general plea of not guilty or non est factum to such a declaration, the whole of the facts are put in issue.

ACTION upon the covenants in an indenture of apprenticeship, declaring, that David Smith, a minor, under the the guardianship of the defendant, by an indenture in writing, dated the day of April A. D. 1789, by and with the advice and consent of the defendant, his guardian, did bind himself an apprentice to the plaintiff, to learn the trade of a tanner, currier, and shoemaker, him faithfully to serve, from said day of April, until he should arrive to the age of twenty one years, which would be on the 25th of May A. D. 1795 ; and said David by and with the consent of the defendant, covenanted to obey his commands, and not depart from his service without licence, during said period, &c. and in consideration thereof the plaintiff covenanted to provide for said David, and to learn him the trade of a tanner, currier, and shoemaker, &c. Further declaring, that the indentures of apprenticeship aforesaid, by some inevitable accident, and to the plaintiff inexplicable, were lost and ~~gone out of his power and possession~~, a counter part of which was in the hands of the defendant ; that the plaintiff had performed the covenants on his part to perform in said indenture ; yet said David on the 16th of March A. D. 1793, with the privity and knowledge of the defendant, left the plaintiff's house and service, and was gone to parts unknown to him, whereby he had wholly lost the benefit of said David's service.

The defendant moved for oyer of the indentures alledged in the plaintiff's declaration—to which motion the plaintiff demurred. And judgment—That the motion was insufficient, as it admitted the loss alledged in the declaration. See the case of *Kelly vs. Riggs*, and of *Church vs. Flowers*, ante.

At the superior court, July term, A. D. 1797, the defendant plead not guilty. Issue to the jury.

The defendant objected against any evidence to prove said indentures, or any damages sustained by the breach of them until the plaintiff had proved to the court, that said indenture was lost by inevitable accident.

By the court—The defendant by his plea, has put the whole of the plaintiff's declaration in issue to the jury; and the reasons assigned in the declaration, on the motion for oyer, have been determined by the court, to be sufficient to excuse the not producing them on oyer. The fact of the loss of said indentures by inevitable accident, is put to the jury to enquire after and to decide upon, as much as any other fact alledged in the declaration; and they must find this fact, or they cannot convict the defendant upon any other evidence short of the indenture itself. The defendant in his motion for oyer might have denied the fact of the loss, &c. the court in that case must have enquired after the fact, and as they found it to be true, or not true, would have ordered oyer to have been given or not, but now this fact is put to the jury, and unless they find the loss, &c. the jury must find the evidence insufficient to convict the defendant, without the indenture. The evidence was admitted to go to the jury.

The jury found a verdict for the plaintiff.

The defendant moved in arrest of judgment, that the plaintiff's declaration was insufficient, because there was no averment that the defendant covenanted, only that said David covenanted with his advice and consent.

MIDDLESEX COUNTY,

Motion in arrest over ruled. And judgment, that the declaration was sufficient.

By the court.—The declaration states, that said David was a minor, that the defendant was his guardian, and that said minor by and with the advice and consent of the defendant, bound himself an apprentice, &c. and covenanted to serve, &c. The statute supplies the rest which is, “that no person under the government of a parent, guardian or master, shall be capable to make any contract or bargain, which in the law shall be accounted valid, unless the said person be authorized or allowed so to contract or bargain, by his or her parent, guardian or master; in which case, such parent, guardian or master shall be bound thereby.”

Joseph Wetmore *vers.* David Lyman.

Direct damages only to be given on a revocation of a submission to arbitration.

ERROR to reverse a judgment of the county court on an action Lyman *vs.* Wetmore, on a note for £50, dated 23d of July A. D. 1794—demanding £20.

Plea in bar—that said parties submitted a certain action then depending in the superior court, viz. Wetmore *vs.* Lyman, to the award of Messrs. Alsop, &c. arbitrators mutually chosen by the parties—and that said note was executed and delivered to said arbitrators to hold and oblige the defendant to abide and perform the award said arbitrators should make in the premises on or before the 20th of August A. D. 1794, and that on the 15th of said August, the defendant revoked the power of said arbitrators, and before the plaintiff had been put to any cost or trouble on account of said submission—and on the 15th of September next, after and before the date and impetration of the plaintiff's writ, he tendered to the plaintiff two dollars, which was in full of all cost, trouble and expense which had accrued on account of said submission and revocation.



The plaintiff replied, that the action submitted was to have been called out of court—but by reason of said revocation he had been put to great cost, in defending said action at Haddam, which would have been saved, had not the defendant revoked said submission.

There was a rejoinder and a surrejoinder, which was demurred to.

The judgment of the court was, that the surrejoinder of the plaintiff was sufficient, and for the plaintiff to recover.

On a hearing in damages, the court admitted proof of the cost, time and expense Lyman was at in trying said cause in the superior court at Haddam in December A. D. 1794, to which evidence objection was made and a bill of exceptions filed by the defendant; and said county court gave judgment for the plaintiff to recover £10 lawful money damages.

Error assigned was—that no evidence of said cost and expenses, &c. ought to have been admitted; nor any damages assessed on that account, they being too remote and only consequential.

Plea—nothing erroneous. Judgment—manifest error.

By the court—The immediate damages are the trouble and expense the plaintiff had been put to in preparing for said arbitration. The expenses, &c. in the action at law would have been the same, had there been no submission, and the damages recovered, ought to be only such as were direct and immediate, arising from the submission and revocation.

Hopstill Crittendon *vers.* Hezekiah Brainard.

PETITION in chancery—shewing, that on the 7th day of November A. D. 1764, the petitioner mortgaged to Thomas Ougston, about ^{Fifteen years} acres of possession will bar an equity of redemption, unless there are land, with a house and barn standing thereon, of great

equitable circumstances which will take it out of the rule. The courts of chancery will square their decisions as near as may be with the rules of law.

er value than five hundred dollars; that said deed of mortgage was defeasible upon paying the sum of £241-3 New-York money, by the 7th of November then next—That said premises were afterwards conveyed by said Ougston to Benjamin Douglass of New-Haven, who afterwards on the 10th of May A. D. 1769, conveyed by deed ninety rods of said land and said dwelling house to Hezekiah Brainard of Had-dam—That Franklin and Underhill of New-York, levied an execution against said Ougston on the residue of said premises and made a title thereto to themselves on the 1st of May A. D. 1769—That said Franklin and Underhill on the 2d of said May conveyed all their right and title in said premises, to said Hezekiah Brainard; and said Hezekiah Brainard claimed said premises in virtue of the deeds and conveyances aforesaid to have been derived from said Ougston; and the same had been subject to the petitioner's equity of redemption—That the whole which said Brainard ever paid for said premises was £75 to said Douglass in May A. D. 1769, and £62 to said Franklin and Underhill, amounting in the whole to £137 lawful money—That soon after receiving said deed from said Douglass and said Franklin, said Hezekiah entered into the possession thereof and had ever taken the whole rents and profits to himself—Previous to which time the petitioner remained in the possession thereof. And that although the petitioner had ever claimed his right, yet through poverty and the distresses of the late war he had been prevented prosecuting of it—and praying that said Brainard might be decreed to account for the rents and profits—and for the court to ascertain the debt due, and order and decree that upon the petitioner's paying the sum due, said Brainard be compelled to release said premises to him, &c.

Plea—that said petition contained no foundation for the interposul of a court of chancery.

Judgment—that the plea was sufficient.

By the court—The premises appear by the petition, to have been mortgaged for as much as they were

worth; and were sold for less than the mortgage money. The respondent has been in possession ever since A. D. 1769, holding and claiming it as his own and taking all the profits to himself. It was in the power of the petitioner to have paid the debt and reclaimed the estate—fifteen years possession bars a right at law, unless there are circumstances which will save it out of the statute—and here are no circumstances stated which would save the right at law—and courts of chancery ought to square the rules which regulate property as near to the rules of law as may be.

Robert Crane, &c. heirs of Jesse Crane, deceased.

APPEAL from an order of the court of probate in accepting and approving of the distribution of a certain part of the estate of said deceased, to Nathan Crane, under the will of said deceased. A lapsed legacy falls into the residuum.

Reasons for the appeal—That said Jesse Crane, deceased, on the 11th of January A. D. 1794, made, executed and published his last will and testament in due form of law—wherein were the following clauses and bequests, viz. “And as touching my worldly estate, I give and dispose of the same in the following manner and form, viz. Imprimis, I give and bequeath to my beloved wife Mary, the use and improvement of one third part of my real estate, during her natural life. Also, I give to her and her heirs forever, all notes of hand, executed and made payable to her. And also, the one half of my personal estate after my just debts and funeral charges are paid.” He then gives some legacies to a brother and to a nephew of his.

Then he says, “I give and devise to my nephew Nathan Crane and to his heirs and assigns for ever, all my estate both real and personal, not heretofore disposed of;”—and appointed said Nathan his executor. That the wife Mary, died in the life of the testator—that afterwards the testator died, and said will was duly proved and approved. And that said estate

given to the wife, ought to have been distributed to the appellants, who were the heirs at law of said testator, being brothers' and sisters' children, as intestate estate.

To these reasons a demurrer was given, and judgment of the court, that said reasons were insufficient, and the order of the court of probate was affirmed.

By the court—The interest given to the wife was a lapsed legacy, and fell into the residuum. The will in the life of the testator disposed of nothing, but only provided how the estate should be disposed of after the testator's death. The restrictive clause in the residuary bequest to Nathan, "*not heretofore disposed of*," *heretofore*, has relation to the several preceding paragraphs in the will—*disposed of*, means an effectual transfer, or disposition by the will, which could not be, until the death of the testator. It is therefore as though the testator had said, all my estate which shall not pass, by the preceding bequests in my will to the legatees therein named, I give to my nephew Nathan Crane. It is evident, that the testator did not intend that any of his estate should be left intestate, and also, that he preferred said Nathan to any other of his relations, except those particularly named. This was a lapsed legacy, and made a part of the residuum, which was not disposed of by the preceding clauses in the will.

This judgment was afterwards carried by a writ of error to the supreme court of errors, and there affirmed.

Jonathan Miller *vers.* Gurdon Wetmore.

Courts of
chancery will
not judge over
the heads of ar-
bitrators any
more than
courts of law.
The party has

ERROR to reverse a decree of the county court, in a petition in chancery—Wetmore *vs.* Miller. Shewing, that they submitted certain matters of controversy to the arbitrament and final award of Messrs. Whittlesey, Starr, and Hubbard, arbitrators; and each gave a note of £200 to abide, &c. that one of the claims made by said Miller, was of about £50,

on account of some timber purchased of one Johnson, in partnership with said Wetmore, which said arbitrators allowed to said Miller, against law and evidence; and stated the evidence before the arbitrators. 2d, That said Wetmore claimed the sum of £30, to be due to him for a remainder of timber marked N×H sold to said Miller; and stated the evidence of Stephen Miller and Stephen Wetmore, given to said arbitrators in support of said claim, and that the arbitrators rejected said claim against law and evidence. 3d, A claim of £6 made by said Wetmore on said Miller, for boarding him, which said Miller before said trial and since said award, acknowledged to be just, yet said arbitrators disallowed it.

adequate remedy at law for corruption or partiality in arbitrators, or mistakes in awards.

Further alledging, that said arbitrators refused to show him the minutes, by which they made up their award, which by said submission they were to do.

Further, that some evidence was taken by the assent of the parties, on a material subject, by two of said arbitrators, who were to report it to the third arbitrator, who was then absent, before they made up their award, which by mistake they never did, viz. the testimony of Stephen Miller and Stephen Wetmore, aforesaid, respecting said Wetmore's claim of £30.

Further, that said Miller exhibited to said Starr, one of said arbitrators, fundry papers which related to the matters submitted, and which had a material influence in the decision of said cause, without the knowledge of said Wetmore, or of said other two arbitrators—and that said Miller conversed frequently with said Starr alone about the matters submitted. That a suit was depending on said £200 note to enforce said award—praying for relief, and for an injunction on said suit at law on said note and award.

The respondents plead in abatement, that said petition contained no sufficient grounds for the interposition of chancery. And judgment—Plea insufficient. And the county court proceeded and heard said petition on the merits, and passed a decree, that they

MIDDLESEX COUNTY,

found all the facts alledged in said petition to be true ; and laid a perpetual injunction on said suit at law, on said note, and on the award.

That on said trial the petitioner offered said Stephen Wetmore and Stephen Miller, as witnesses, to prove what they testified to two of said arbitrators relative to said Wetmore's claim of £30 aforesaid, and which they were to report to the third, but did not—who were objected against by said Miller, and admitted by the court—upon which a bill of exceptions was filed and allowed by the judge.

Errors assigned were—That said county court ought to have adjudged said plea in abatement sufficient—2d, That said county court ought not to have admitted said witnesses.

Plea—Nothing erroneous. And judgment—Manifest error—upon the ground that said plea in abatement ought to have been adjudged sufficient.

This court no more than a court of law, will judge over the head of arbitrators, in any matters which lay properly before them. This goes to the three first grounds of complaint—as to the others which go to shew mistakes, and partiality in said arbitrators, the petitioner has adequate remedy at law.

John Warner *vers.* Azubah Willey.

A woman accusing a man in the time of her travail, an essential requisite to her recovering maintenance for a bastard child.

ERROR to reverse a judgment of the county court, on a complaint exhibited by said Azubah, to justice Chapman, dated the 21st of A. D. 1796, therein complaining, that said John had begotten her with child, in fornication, in the latter part of January A. D. 1795, which bastard child was born of her body on the 25th of October A. D. 1795, and is alive—praying that he might be compelled to contribute to its maintenance.

Upon which said John was arrested and laid under bond, to appear and answer to said complaint, before the county court, &c. That said John appeared

at said county court, and plead that he was not guilty. Issue to the court.

That said Azubah in support of said complaint, made oath, that said John was the father of said child, and that she had been constant in her accusation of him; that said child was begotten in the latter part of January A. D. 1795, at her father's house, and was born on the 26th of October 1795—that no other man had carnal knowledge of her body but said Warner; that he had prevailed over her by proffers of marriage. That she did not publicly accuse him with being the father of said child, until about the date of her complaint—that she informed said Warner of it in A. D. 1795, and at other times, but had kept it private at his desire, and did not inform her parents and friends of it, because said Warner told her that if she would not accuse him publicly, he would do better by her than the law would compel him to do—that in the time of her travail she did not declare who the father of said child was, nor was she asked the question—that she was delivered of said child at her father's house, attended with a midwife, a number of neighbouring women, and her mother, her father also being then at home.

Bushnel Miller testified that he was frequently at said Azubah's father's with his wife and saw said Warner there with her, and one night in January A. D. 1795, when he went to bed he saw said Warner there with her.

Keziah Willey, sister to said Azubah, testified, that she frequently saw said Warner at her father's house, and when she retired to bed, she left said Warner with said Azubah and no other person in the room; and about nine months before said child was born, she saw said Warner there visiting said Azubah, and after said Azubah was pregnant, she asked said Warner why he did not marry her, he said that he intended to suspend the matter until he could see the child, but he did not deny but that he had had unlawful intercourse with her—and said Warner urged her

NEW-HAVEN COUNTY,

not to tell her sister that he was willing to marry her—and he went into another room, and embraced said Azubah and placed her on the bed with him, and they conversed together a considerable time.

To this evidence which being all that was on the part of the complainant, the said Warner demurred and the complainant joined in the demurrer.

And said county court gave judgment, that the evidence was sufficient, and that the defendant was guilty, and that Azubah recover of said John Warner for maintenance of said child, seventy cents per week for four years from the birth of said child, in case the said child so long lived.

Error assigned was, that the evidence was insufficient and ought so to have been found and adjudged by said county court.

Plea—nothing erroneous—and judgment, manifest error.

By the court—the statute makes it an essential requisite in the constancy of the accusation of the woman, that she be put to the discovery in the time of her travail, in all cases where it can be done, and that she charge the man in that critical hour with being the father, as the *sine qua non*, of her recovering maintenance—and this was not done in this case. See *Hitchcock vs. Grant*, 1 vol. Root's Rep. 107.

New-Haven County, January Term, A. D. 1797.

Freeman *vers.* Beadle, &c.

A parol agreement extinguished by the written one. An amendment by the statute

ACTION, declaring, that on the 5th of January A. D. 1795, the plaintiff had an action of trespass, assault and battery, depending in the superior court at New-Haven, against said Beadle, &c. which action on said 5th of January, the plaintiff and defend-



ants mutually agreed to submit to the award of James Wadsworth and Simeon Bristol, Esq. arbitrators mutually chosen by the parties, to meet at Reuben Brunson's in Cheshire, on the 12th of March then next, and that said arbitrators should hear and determine said action according to law and evidence, and publish to the parties their award; and that the parties to said submission would stand to, abide and perform the award said arbitrators should so make and publish, and in order to compel the parties to abide and perform said award, each party to said submission made and executed to the other their obligations for £600 lawful money each, and delivered them into the hands of said arbitrators; and thereupon said action of trespass was called out of court; and that in consequence of said submission the plaintiff was at cost and expence in convening said arbitrators, summoning witnesses, procuring counsel, &c. and in making the necessary preparation for a trial before said arbitrators at said Brunson's on said 12th of March, when and where the defendants appeared and revoked the power of said arbitrators—by means whereof the plaintiff had lost all benefit by said submission—had lost all his cost and damage in his action at law, and his cost in preparing for said arbitration.

not allowed, where it wholly changes the nature of the action.

Plea—non assumpsit. Issue to the jury.

The plaintiff offered parol proof to support his declaration. This was objected to as inadmissible, until he produced the written obligation stated in the declaration, to have been given by the defendants to oblige them to abide the award.

By the court—This action is laid upon the mutual agreement and submission entered into by parol to submit to and abide the award of said arbitrators—and it appears by the plaintiff's own shewing, that a written obligation was given to compel them to perform the same thing, by which the parol agreement is extinguished; and no action can be maintainable on the parol agreement, but must be brought upon the writing, consequently parol evidence is not admissible,

not because it doth not go to prove the promise laid, but because, by the plaintiff's own shewing, the promise does not exist.

Upon which, the plaintiff moved to amend his declaration by inserting the following paragraphs, viz. "And the defendants their said obligation or writing disregarding, have never paid the same nor any part thereof, nor any part of said damage, expense and cost on said writing or obligation, which amounts to the sum of fifty pounds lawful money.

"And the plaintiff further saith, that when said arbitrators met as aforesaid, the defendants upon said revocation, without the permission of the plaintiff, took said writing or obligation, by them executed, and now hold and withhold the same, or have destroyed it, so that the same is lost to the plaintiff."

By the court—The words of the statute are unlimited as to the time when an amendment may be allowed to be made, it may therefore be made at any time before the cause is committed to the jury. But as the amendment moved for in this case would make a new declaration and totally change the nature of the action, with which the defendants ought to be served with twelve days notice, it does not come within the statute, and may not be allowed.

Deodat Bement *vers.* *Miller Peck.*

Under the plea of non assumpsit to an express promise, neither performance, nor any act of the plaintiff may be given in evidence by the defendant.

ACTION upon a written agreement, dated the 24th of February A. D. 1794; wherein the defendant agreed to finish the two front chambers and a bed room chamber, in the plaintiff's house, and to remove the garret stairs, &c. by the first of April A. D. 1795, the plaintiff to furnish the lath, the lime, and the lath nails for doing the work—also to build a doorway fence, in a particular manner, by the first of November A. D. 1794; the plaintiff to furnish the posts for the fence, for which the plaintiff was to pay the defendant £21, in a certain manner.

Plea—Non assumpfit. Issue to the jury.

The defendant offered to give in evidence under this issue, that he was prevented from doing the work by the plaintiff's leasing the house to one Parsons, and agreeing to postpone the fence until the first of May 1795, which was objected against.

By the court—The evidence is not admissible ; and that for two reasons—1st, The only question upon this issue is, whether the defendant promised or not ? This evidence goes upon the ground that he did promise, and offers an excuse for not performing it, which would be repugnant and absurd—2d, By the statute it ought to be pleaded, it being an act of the plaintiff which the defendant relied upon to save himself. The defendant then moved for liberty to alter his plea, which the court granted.

Timothy Phelps *vers.* John R. Livingston, Dickson and Mackintosh.

ACTION declaring, that the defendants who were traders in company, and jointly concerned in the cotton and woollen manufactory in New-Haven, in and by a certain writing or note, under the hand of John Erwin, by him well executed, for and on account and in behalf of the defendants, on the 29th of March A. D. 1796 ; the said Erwin then being agent and attorney to the defendants, and sole superintendent of said manufactory, with full power and authority to negotiate the concerns of said manufactory, and for that purpose to receive money and to execute notes in that behalf, promised the plaintiff to pay to him 500 dollars in thirty days from the date, as by said note, &c. which note had never been paid.

A note executed by one person may be given in evidence against a company—other evidence than the power itself may be given by the plaintiff to prove the authority of an agent to bind a company.

Plea—Non assumpfit. Issue to the jury.

The plaintiff offered the note signed by John Erwin, only to prove the promise.

The defendants objected against its being given in evidence to the jury, because it is under the hand of

FAIRFIELD COUNTY,

John Erwin only, without any addition of agent, attorney, or superintendant, and so could not be any evidence of a promise made by the defendants.

By the court—The note may be admitted to go to the jury. The defendants might bind themselves by the name of John Erwin, and they might authorize him to bind them in the same manner and by that signature—and it is the same note by which the plaintiff declares they did promise; and if the plaintiff doth not evince that John Erwin had authority to bind the defendants in this manner, and that they are bound by this signature, he must fail of recovering.

The defendants then objected against any evidence, written or parol, being given to the jury to prove said Erwin's authority to bind the defendants in this manner, other than a special written power of attorney from the defendants authorizing him to execute said note in this manner.

By the court—Other evidence may be received to prove Erwin's authority, besides a special power—for such special power must be in the knowledge and possession of the defendants and said Erwin, and is not in the power of the plaintiff to produce; other evidence must therefore be resorted to by the plaintiff to prove such power.

Verdict was for the plaintiff to recover, and judgment accordingly.

Fairfield County, January Term, A. D. 1797.

Josiah B. Benedict vers. Sarah Roberts.

In cases of
bastardy, the
issue put must
be answered.—
The bond to

ERROR to reverse a judgment of the county court, in a prosecution of the said Sarah, against the said Benedict, for the maintenance of a bastard child, born on the 18th of October 1794—which



she alledged was begotten on her body in fornication, by the said Benedict—upon which complaint said Benedict was bound over to the county court, to answer to said complaint; and before said county court plead that he was not guilty, and put himself on the court for trial. And said county court gave judgment, “that having considered the proofs, are of opinion, that the said Josiah B. Benedict, begot said bastard child, and do judge him to be the reputed father of said child—and that he pay unto the said Sarah, £6-1-6 for lying-in expences, also the cost of this prosecution, taxed at £4-17-7—that he give security to the town of Ridgfield, to indemnify them from charge, &c. and that he pay to the said Sarah Roberts 3/6 per week, for the maintenance of said child, to commence six weeks after the birth of said child, to be paid quarterly, during the pleasure of the court.”

indemnify the town, must be in a sum certain, and the maintenance ordered must be for a fixed period of time.

Errors assigned—1st, That said court had not found the issue. 2d, That said court had adjudged that said Benedict should be charged with the maintenance of said child during the pleasure of the court, which was a void judgment. 3d, That no sum was fixed which should be given as security to indemnify the town of Ridgfield.

Judgment—Manifest error, as to all the exceptions in error.

The court have not answered the issue put, nor fixed the sum of the bond to be given to indemnify the town, and have ordered that the maintenance shall continue during the pleasure of the court.

*Litchfield County, January Term, A. D. 1797.*Benjamin Goodrich *vers.* Richard Nickols.

Parol evidence not admitted to prove a forfeiture incurred, for not giving a deed of land agreeably to a parol contract.

ACTION declaring, that on the 10th of December, A. D. 1796, the defendant agreed to sell two parcels of land, lying in Irish Creek, in Virginia, one of one thousand acres, and one of one thousand five hundred acres, at 3/. per acre, to be paid in five years, with interest for four years, which the plaintiff also agreed to buy on the terms aforesaid; which they agreed to reduce to writing at some future time, viz. on the 10th of May A. D. 1796—and the defendant for a valuable consideration, promised that he would come forward and convey said two tracts of land to the plaintiff on said 10th of May, at 3/. per acre, upon the plaintiff's securing the pay on the terms aforesaid, or would forfeit £100. That the plaintiff on said 10th of May, stood ready to give security as aforesaid, but the defendant wholly failed to come forward and make said conveyance, whereby he had forfeited said £100.

Plea—Non assumpsit. Issue to the jury.

The plaintiff offered parol evidence to prove the agreement and promise, which the defendant objected to, as being within the statute made to prevent frauds and perjuries.

By the court—The evidence is not admissible; an agreement to convey lands may not be proved by parol evidence, nor may an agreement to forfeit £100, upon a failure to execute a conveyance pursuant to such an agreement be proved by parol.

Tomkins *vers.* Beers.

A partner with the defendant in the transaction for which he is sued, cannot be

ACTION declaring, that on the 16th of October 1786, the plaintiff was owner of three rights of land, in Lemington, and one in Winlock, in the state of Vermont, on each of which rights was laid a tax of ten dollars; and on the 5th of June 1787,

said taxes being unpaid, the defendant received of the plaintiff several bills against the towns of Lemington, Winlock, Lewis, &c. to the amount of £15-15-7 lawful money, which he promised to apply in payment of said taxes, as far as was needed, and to account to the plaintiff for the overplus. That the defendant never paid said taxes, but applied the bills to his own use, by means whereof said rights had been sold for the taxes, and were wholly lost to the plaintiff.

qualified to be a witness, by a discharge from the defendant.

Plea—Non assumpsit. Issue to the jury.

One Judd, was offered as a witness, and objected to, because he was in partnership with the defendant at the time of receiving said bills.

The court heard the proof, and found that he was in partnership, and excluded him.

The defendant then executed to Judd, a discharge, and moved to have him admitted.

By the court—This may discharge him from the defendant—but if he was in partnership as aforesaid, he will be liable to the plaintiff, and this discharge will not cut off that liability.

Solomon Sanford *vers.* William Walsburn and Rachel his wife.

PETITION in chancery—shewing that on the 18th of August A. D. 1773, the petitioner's father, Moses Sanford, borrowed of Lewis M'Donald £100 lawful money, and to secure the payment of it in one year with the interest, mortgaged twenty acres of land with the buildings, worth £300—that said Moses had made sundry payments on account of said debt, when said Lewis died and by will gave said debt to said Rachel the daughter of Daniel M'Donald, then a minor; that in November A. D. 1784, Daniel M'Donald, guardian to said Rachel, called on said Moses for said debt, there then being due £162-15 lawful money, and said Moses being unable to pay said debt and unwilling to give up said land for so small a con-

A court of chancery will relieve against mistakes in the drawing of deeds, &c. where by accident or fraud they are not drawn according to the agreement of the parties. A mere right of action, controversy in the law or suit in

chancery, relative to a disputed title, is not assignable, so as that the assignee may prosecute in his own name.

This judgment was reversed in the supreme court of errors.

sideration, it was agreed that the petitioner should purchase the mortgaged premises and thirty acres adjoining to said twenty acres, at the price of £500 lawful money, and should give security for said debt to said Rachel, which the petitioner agreed to; and said Daniel delivered up said mortgage of the twenty acres given by said Moses, it not having been recorded, and said Moses gave a deed of said twenty acres and said thirty acres, for the consideration of £500 to the petitioner, and the petitioner executed two notes to said Rachel for said sum of £162-15 lawful money, dated the 18th of November A. D. 1784; and as a further security, said M'Donald requested the petitioner to give a mortgage of said two pieces of land he bought of his father, to said Rachel, to which the petitioner consented; and they applied to Isaac Baldwin, Esq. of Litchfield, to draw said deed of mortgage, and by mistake and accident, said Baldwin drew said deed an absolute deed of warranty, therein expressing the consideration to be one hundred and sixty-two pounds fifteen shillings lawful money, the precise sum of said two notes, given by the petitioner to said Rachel; which deed was drawn an absolute deed, contrary to the agreement of the parties and the instruction given to said Baldwin, by mistake—and that the petitioner relying upon it that said deed was drawn a mortgage according to the instructions given to said Esq. Baldwin, executed and delivered said deed to said Rachel, before he discovered the mistake, that some short time after he discovered the mistake and immediately after informed said Daniel M'Donald of it, and requested to have it rectified, that said Daniel admitted that it was to have been drawn a mortgage, and said it should ever be considered and treated as such according as was agreed; upon this the petitioner relying upon the honesty of said Daniel, did not then press the matter any farther, that said deed was of the same date and was delivered at the same time said two notes were; and was given for no other consideration, than a collateral security for said two notes, and said deed was for many years after considered and treated as a mortgage, by all the parties con-

cerned. That the petitioner continued in possession of said premises, using and improving it as his own, taking all the profits to himself without account or being called upon for the same, and paid all the taxes thereon for the full term of four years, and said Rachel or her father the said Daniel, at the end of each year, called upon the petitioner for the interest of said £162-15 which the petitioner paid without any suspicion that his right of redemption would be questioned, as her father said Daniel and the said Rachel had ever acknowledged it : that said Rachel afterwards intermarried with William Washburn, who in right of said Rachel, had set up claim to these lands as being an absolute estate in fee, and in A. D. 1788, put the petitioner out and took possession of said lands and utterly denied the petitioner's equity of redemption therein, whereby the petitioner was deprived of his property, worth £500 most unjustly, for a debt less than half the value, and praying for relief in the premises.

To which the respondents plead in bar, that as to any agreement that said deed was and should be intended and considered as a collateral security for said debt, they were wholly ignorant. That there was not nor is any note or memorandum thereof, in writing, signed by the parties, or any person in their behalf ; and that such agreement, if there was any, is utterly void, by force of the statute made to prevent frauds and perjuries. And they further plead, that said Solomon and Daniel, did not apply to said Isaac Baldwin, Esq. to draw a mortgage deed of said land, and said deed was not by said Baldwin drawn an absolute deed by mistake and accident ; nor was said deed by mistake executed by said Solomon, nor did he verily believe and suppose it was a mortgage deed of said land for collateral security of said £162-15, as was alleged in said petition.

The petitioner replied and affirmed, the facts alleged in his petition, and demurred to the rest of the plea, and both issues were joined.

LITCHFIELD COUNTY,

The court heard the evidence and the arguments, and continued the case to advise.

At the superior court, January term, A. D. 1798, the cause was reargued ; and the court found that it was agreed between said Daniel, father and guardian of said Rachel, and said Solomon, that said deed should be drawn a mortgage, defeasible upon said Solomon's paying said debt of £162-15 lawful money, and the interest ; and that by mistake and accident it was drawn and executed a clear absolute deed, without such condition ; and that upon said mistake's being discovered soon after, by said Solomon, he applied to said Daniel M'Donald, and informed him of it, and he acknowledged it was a mistake, and that it ought to have been a mortgage ; and to prevent said Solomon from immediately seeking to have said mistake corrected, he assured him it should make no difference, for it should ever be considered and treated as though it was a mortgage for security of said debt ; that said Solomon was thereby dissuaded from pursuing the matter farther at that time—and that as to the residue of the respondent's plea it was insufficient, and thereupon ordered and decreed, that the petitioner might redeem said lands upon paying to the respondents what should be found to be justly due ; and the court appointed a committee to take the account, which committee made report ; by which it appeared that a balance was due from the petitioner to the respondents of the sum of £238-19-7, lawful money ; and that said lands were worth £500. Said committee further found, that the petitioner by deed dated the 18th of February A. D. 1795, released all his interest in said lands to Meads Merrills, for the sum of £300 lawful money, and by agreement of the parties, the following facts were incorporated in the decree, viz. that said Meads Merrills, became the assignee of the equity of redemption, in said lands, by a deed found by said committee to have been procured from the petitioner, while the respondents were in possession of said premises, claiming the same by title adverse to the title of the petitioner, and denying that they held the



same as mortgagees, as stated in the petition, but asserting an absolute indefeasible title thereto; also that said Merrills caused the bringing of this suit, and had been at the greater part of the expence in carrying it on; and also that the respondents and their counsel knew at the time of bringing this petition, that the petitioner had executed the above deed to said Merrills.

The court accepted the report, and ordered and decreed, that upon the petitioner's paying or tendering to the respondents the sum of £238-19-7 lawful money, and the interest, on the 15th of November then next, said William and Rachel should release to the petitioner all their interest in said premises, under the penalty of £700.

By the court—It is clear that this deed was agreed and understood by all parties, to be a collateral security for said £162-15, and was to have been a mortgage, and by mistake was drawn and executed an absolute deed; and that when the mistake was discovered the petitioner was diverted from immediately seeking a remedy, by the solemn promise and engagement of said Daniel M'Donald, that it should ever be considered and treated as a mortgage for that debt; and was so considered and treated by said Daniel and said Rachel, for a number of years, and until the intermarriage of said Rachel with said Washburn, and the premises coming into his management and possession; since which he claims to hold the lands as an absolute estate in fee, unincumbered by the petitioner's equity of redemption, thereby converting a mistake in drawing the deed, and the confidence placed in the faith and honor of said Daniel M'Donald, into the means of injustice, fraud and oppression. The equity is apparent, and the principles upon which the relief is granted are so plain and just in themselves, and so universally recognized and established both in this country and in England, that they cannot be mistaken.—See Mitford's Chancery, 116—2 Atkins, 203 and 111, do. 388, Joyner *vs.* Hatham, Kirby's Reports, 399—and see the case of *Mehitable Parsons vs. S. Titus Hosmer*, ante. And as to the rest of the respondents' plea

which is demurred to, it is insufficient, for the statute of frauds and perjuries has no application in a case of this nature.

The objection made by the respondents to a final decree's passing, on the ground of a fact found by the committee, and agreed to by the parties, viz. that the petitioner on the 18th of February A. D. 1795, by deed for consideration of £300, released all his interest in said lands to Meads Merrills, is of no weight against a decree's passing, considered in any point of light in which it can be viewed. For at this time and for some time previous, the respondents were in possession of the lands, holding and claiming them as an absolute estate in fee, against the petitioner, and utterly denying his equity of redemption in said lands, whereby he was disseised of his interest in them. A mortgagor remains owner and proprietor of the land, until there is a breach of the condition; and although the mortgagee then has right to enter and take possession, in order to obtain payment of his debt, yet he is accountable for the rents and profits to the mortgagor, until the equity of redemption is foreclosed; and the equity of redemption is as clear and certain an interest in the land, after the condition is failed of being performed as before; in the former case he may pay the debt and defeat the deed, in the latter he has a clear and sure remedy, upon payment of the debt, to recover the lands back again, according to known and established rules of proceedings in chancery. The mortgagee has only a conditional estate in the lands liable to be defeated, by payment of the debt, before the condition is broken, and liable to be reclaimed afterwards, by paying the debt and interest—and though after the condition is broken, he has right to enter, yet he holds it as trustee to the mortgagor, and is accountable to him for the rents and profits; and if at any time before the equity of redemption is foreclosed, he claims to hold it against the mortgagor as an absolute estate, and denies the equity of redemption, he becomes a disseisor of the mortgagor, and ousts him of his interest in the lands. An equity of redemption has ever

been considered as an interest in lands ; it descends to heirs, may be devised by will, or sold for payment of debts ; it may be taken by execution, and appraised off as land ; it is subject to the widow's dower, and will pass by deed only, and it may be barred by the statute of limitation respecting the possession of houses and lands. Further, the objection defeats itself, for it is that the petitioner has passed all his interest in these lands, by said deed to Meads Merrills—now a chose in action will not pass by grant so as to enable the grantee to prosecute in his own name—and the objection goes upon the ground that the thing itself is transferred from the petitioner to Merrills, if it is a thing transferrable by deed, it is that of which the petitioner might be dispossessed, as he in fact was at the time of executing the deed : for the respondents having taken the actual possession of said premises, had set up a claim to them as an absolute indefeasible estate, by force of an absolute deed, on the face of it, from the petitioner, and totally denied the petitioner's equity of redemption in or to said lands, by which the petitioner was disseised of his equity of redemption ; and his claim turned to a mere right of action, a controversy in the law, or right of prosecuting it in a court of chancery. It is therefore clearly within the mischief of the statute provided against buying disputed titles, and directly contrary to the principles of the common law, against champarty and maintenance.

This judgment was reversed in the supreme court of errors, for the following reasons, viz.

Washburn, &c. *vs.* Sanford. Writ of error from a decree of the superior court in favor of said Sanford against said Washburn, &c. upon a bill in chancery. Two general grounds were relied upon by the plaintiffs in error.

1st, That there appears to have been no note or memorandum in writing of any such agreement as set forth in the petition, and parol testimony is inadmissible to control a clear unconditional deed.

2d, That previous to commencing this suit, the petitioner had transferred all his interest in the lands prayed to be redeemed, to one Meads Merrills, by a quit-claim deed, and therefore the equity of redemption was in Merrills, and the petitioner had no right to redeem. This court reversed the decree of the superior court on the last of these grounds.

The petitioner claims an equity of redemption which entitles him to redeem the lands in question, and urges that the conveyance thereof to Merrills is void under the statute, prohibiting the sale of disputed titles; but the court were of opinion, that an equity of redemption is a species of property not within this statute. The statute requires that the grantor should be ousted of possession by the entry or possession of another; and possession of land by the mortgagee, cannot be said to oust the mortgagor of any possession incident to an equity of redemption; the mortgagee possesses land in pursuance of a contract with the mortgagor, and the mortgagor has no claim to possession either in law or equity—all he claims is the privilege of acquiring a right to possession by paying the mortgage money. This privilege, called an equity of redemption is a right vested in the mortgagor, while the right to possess and actual possession is in the mortgagee; the mortgagee's possession is so far from ousting the mortgagor of his equity of redemption, that it exists in perfect unison with it. The mortgagee's claiming an absolute estate in the land can make no difference, since an adverse claim is not an adverse possession; a possession claiming a right has been thought necessary, but that claiming a right without adverse possession should vitiate a conveyance by the person in possession, is novel. An equity of redemption is a mere right of which a person cannot be dispossessed, and is not in any sense within the meaning of the statute against selling disputed titles, it has been said to appear in this case, that Merrills caused the bringing of the petition, and has been at the expense of the application, and therefore the petition may well be sustained in favor of Sanford for the ben-



est of Merrills, but this cannot require a moment's consideration; on this principle, any individual may become plaintiff in the courts of law and petitioner in the courts of chancery, for all the real parties who wish to apply to those courts for redress. It is of importance that relief should be granted to the person who appears from the record to be entitled to it, otherwise a door would be opened for further litigation between the nominal party and the party in interest, which the court suppose would be highly inconvenient and improper.



Hartford County, February Term, A. D. 1797.

William Carter *vers.* Daniel and Stephen Rofs,
absent, absconding debtors.

ACTION, declaring, that on the 5th of March A. D. 1794, the plaintiff and defendants, said Stephen for himself and said Daniel, entered into the following agreement in writing, viz. "Whereas there is a dispute depending between the plaintiff and said Daniel, concerning a certain tract of land, being the one half of a township No. 5, in the first range of towns in the county of Ontario in the state of New-York; in which said William Carter claims that he ought to have a share with said Daniel, and that he has been put to trouble and expense respecting the same, and likewise concerning a sum of 700 dollars, which was paid to said William by Oliver Phelps, Esq. and all other matters in consideration of his receiving the same, they did mutually agree and submit all and every of the above mentioned matters of dispute to the award and determination of Oliver Phelps and Gideon Granger, Esq's. to be determined as soon as may be, viz. whether the said William ought to be

An award
must be final
and certain or
it will not be
binding.

HARTFORD COUNTY,

a partner in said lands with said Daniel, and what shall be done with said 700 dollars which said William has received, and the trouble and expense he has been at, in the premises, all to be determined as the said Phelps and Granger shall think to be right and just between the parties, and bind themselves in the sum of £6000 New-York money, each not to withdraw said submission, and that each party will perform the award said arbitrators shall make in the premises, and said award shall be a final end of all matters submitted. Executed the 5th of March A. D. 1794."

That said arbitrators having heard the parties on the 18th of October A. D. 1794, and made and published their award in the premises in writing, by which they found and awarded that "said William do have some share or interest in the avails of said half township of land No. 5, &c. and that said Daniel Ross, pay to said William Carter, for his share of the avails of said land, £415-4 money of New-York, in three months, with interest—and also pay £5 like money, for cost, in three months—and upon payment of said sums and interest, said Daniel and William shall execute to each other good and sufficient releases in law, of and from all claims, demands, suits and controversies, of and concerning said half township of land No. 5, and of and concerning all the avails and monies which have arisen by the contracts, negotiations, and sales of said township," &c. That the plaintiff had kept and performed said award, and that neither the said Daniel or said Stephen, had kept and performed said award on their part.

The defendants demurred to the declaration. Judgment—That the declaration was insufficient.

By the court—The award is uncertain; it is that said William do have some share in said township, which leaves it altogether uncertain how much. It is not final, the 700 dollars received of said Phelps, is expressly submitted, and no notice taken of them in the award, although the award is particular as to the

other matters submitted.—An award must be certain and final, to render it valid and binding upon the parties.

Rhoderick Sheldon, &c. heirs of Daniel Sheldon, late of Hartford, deceased *vers*f. Seth Bird, &c.

PETITION in chancery, shewing that said Daniel Sheldon, father of the petitioners and of Lucy Woodbridge, the wife of Joseph Woodbridge, on the 21st of October A. D. 1771, mortgaged five acres of land in said Hartford, to Seth Bird, to secure the payment of £126-3 lawful money, by the 21st of October A. D. 1773, with the interest. That said Daniel died in August A. D. 1772, intestate, leaving the petitioners and said Lucy his heirs at law. That their uncle, Isaac Sheldon, took administration on their father's estate. That said administrator exhibited an inventory of their father's estate, on the 20th of February A. D. 1773, in which no notice was taken of the mortgaged premises. That said Seth Bird preferred his petition to the general assembly in May A. D. 1774, for a decree of foreclosure; therein stating that said Daniel's estate was greatly insolvent, and that said mortgaged premises were not worth more than two-thirds of the debt; and that he was willing to accept said land in payment of said debt. Upon which petition, said Isaac, the administrator, only was cited. That said petition was by an act of the general assembly referred to the superior court; and the superior court in March A. D. 1775, after counting upon said petition, that said debt had not been paid, and that the mortgaged premises were not worth more than two-thirds of the debt and that said estate was greatly insolvent, and that said administrator, and one of the heirs of said Daniel, deceased, and some of the principal creditors of said Daniel, had come before the court and agreed that the matters alledged in said petition were true, and declared that they had no objection to a decree's passing, as

A decree of foreclosure against the administrator on an insolvent estate, is no bar to the heirs' redeeming. Minor heirs will be barred of their equity of redemption, by fifteen years adverse possession, unless they petition within five years after they come of age.

prayed for. It was thereupon ordered and decreed that the heirs, executors, administrators and assigns of said Daniel, deceased, be foreclosed and forever debarred of the equity of redemption in and to said mortgaged premises, &c. That said Bird thereupon took possession of said premises, and on the 11th of May A. D. 1775, sold said land to John Chenevard with covenants of warranty. That said Chenevard had taken the profits ever since, which were worth sixty dollars per annum. That the inventory exhibited of said Daniel's estate amounted to £644-6-11 lawful money. That the debts exhibited by said administrator to the judge of probate and allowed amounted to £628-6-3. That said Administrator obtained liberty from the general assembly to sell £567-9-1 worth of the real estate of said deceased, in order to pay debts, under the direction of the court of probate. That upon application, the court of probate gave orders for the sale of the real estate of said deceased, at public auction or private sale, sufficient to raise said sum and charges. That on the 9th of April A. D. 1797, a report of commissioners was made to the court of probate, containing a list of debts, to the amount of £708-3-11 lawful money. Which commissioners before that time had been appointed upon a representation of insolvency, although no record thereof appeared—That on the 22d of February A. D. 1785, said estate was by the court of probate declared to be insolvent, and said administrator ordered to sell the whole of the estate for the benefit of the creditors—That on the 26th of April A. D. 1786, said administrator died, and said estate not wholly settled—That Joseph Woodbridge administrator on said Isaac's estate, exhibited an administration account on said Daniel's estate, which was accepted and allowed by the court of probate, by which it appeared that said Daniel's estate was insolvent; in which account was a charge of £97 for debts allowed by the commissioners, which had never been paid—That all the heirs of said Daniel were minors at the time said decree of foreclosure was passed, except Daniel the eldest son; that said Daniel was born Oct-

ober 1750, Rhoderick in May 1755, Charles in May 1757, Lucretia in September 1759, William in August 1761, and Lucy Woodbridge in November 1764—That said Isaac left out of the inventory of said Daniel's estate, taken in 1773 and '74 £182-13-5 of real estate and £37-14-9 personal estate, which was never added or exhibited until November 1794, when it was exhibited by said Joseph to the court of probate—That from the 20th of February 1773 until November 1794, said Daniel's estate appeared by the files and records of the court of probate to be insolvent and the equity of redemption to have been in the creditors—That upon discovering that said estate was not insolvent, they immediately set about finding the truth, and preferred their petition to the superior court in February A. D. 1796, which was continued to the adjourned court in November A. D. 1796, praying to redeem said mortgaged premises—to which said Bird and Chenevard plead said decree of foreclosure in bar, and which was adjudged to be insufficient; and further alledging, that said mortgaged premises had always been of much greater value than said debt, which was well known to said Isaac and said Bird. That the petitioners had been kept in ignorance respecting their right to redeem until 1795—that the rents exceeded the interest sixty dollars—that said Lucy arrived to full age in November 1785, but wholly refused to join with the petitioners in this petition—Praying that an account might be taken, and the petitioners be allowed to redeem said estate, upon paying what should be found to be justly due.

Plea in abatement in nature of a demurrer. Judgment—That the plea in abatement was sufficient.

By the court—This estate became absolute at law, in the mortgagee on the 21st of October 1773. In March A. D. 1775, the mortgagee went into possession of the premises under the decree of foreclosure; and in May following sold it as an absolute estate to said Chenevard, with covenants of warranty. Daniel Sheldon the mortgagor, died in August 1772, Daniel Sheldon, the son, and one of the petitioner's was then

of age. Lucy Woodbridge, the youngest of the children, and who refuses to join in this petition, came of age in November 1785. The first petition brought to redeem, was in February A. D. 1796, twenty one years after the mortgagee entered into possession, and ten years and three months after said Lucy was of age. The statute is "that no person shall at any time make entry into any lands or tenements withheld from him, but within fifteen years next after his right shall descend or accrue to him; and in default thereof, he and his heirs shall be utterly excluded and disabled from such entry after to be made." It is settled that this statute bars all right of action as well as right of entry.

The proviso is, "that if the person who hath right or title of entry, into any lands, &c. was or shall be at the time said right descended, accrued, &c. within the age of twenty one years, non compos mentis, imprisoned, or beyond the seas, such person, his or her heirs, may, notwithstanding said fifteen years, bring his or her action, or make his or her entry, so as such person, or his or her heirs, shall within five years next after his or her coming of age, &c. sue for the same, and at no time after said five years." The petitioners therefore would be clearly barred at law, although the decree of foreclosure in March A. D. 1775, is no bar to the petitioners, they being then minors, and not made parties.

Anne Sheldon and heirs of Isaac Sheldon *vers.*
Rhoderick Sheldon and the heirs of Daniel
Sheldon, deceased.

Chancery will not interpose in the settlement of an intestate estate where the party has adequate remedy in a regular course

PETITION in chancery, shewing that said Daniel Sheldon died in August A. D. 1772, possessed of lands and other estates to the amount of £960-6-2 lawful money; and said Isaac Sheldon was appointed his administrator—that in February 7, 1773, he exhibited a partial inventory of said estate to the amount of £644-6-11; that the debts due from the estate then appeared to be £628-6-3. That the said

Isaac Sheldon obtained liberty from the assembly in May 1773, to sell £567-9-1 of real estate to pay said debts—and an order from the court of probate to sell lands of said Daniel, to that amount, at private sale or public auction, was given.—That in 1774 said Isaac Sheldon made an addition to the inventory of £253-12—that other debts came in, and commissioners were appointed, upon a representation of insolvency, who reported in April A. D. 1776, debts to the amount of £708-3-5—that pursuant to his orders aforesaid, on the 28th of Nov. A. D. 1776, he sold fifty-seven acres of said estate, being his Rocky-hill lot; one piece in the south meadow at a place called the sands, being about six acres—and one other piece in said meadow, about three acres, at the great pasture, to Joseph Woodbridge, his son in law, and gave a deed of that date of said pieces of land, at inventory price. That on the 19th of March A. D. 1778, the said Joseph being at Groton, sold and conveyed all said lands back to said administrator, for the same consideration. And on the 22d of February 1785, said estate was declared to be insolvent, and an order given to sell the whole; and said administrator proceeded and sold the whole of said Daniel's estate, lying in various places, for the most it would sell for, being more than it was appraised at, and prepared his account to settle with the court of probate; but before any settlement was made he died on the 26th of April A. D. 1786, intestate, and Joseph Woodbridge was appointed his administrator, in May 1786, and said Joseph presented said Isaac's administration account, prepared by him as aforesaid, upon said Daniel's estate, to the judge of probate, which said court of probate accepted and approved of; by which it appeared that the debts and charges surmounted said Daniel's estate £24-2-7—that said Isaac's estate was inventoried, including said three pieces of land which he had of his brother Daniel's estate, and they were distributed amongst his heirs, his widow said Anne, having her dower assigned to her in all of them. That the heirs of said Daniel, deceased, had recovered from the heirs of said

of proceedings
before the court
of probate.

Isaac, all the lands in said Hartford, which were conveyed by said administrator to said Joseph Woodbridge, and by him conveyed back to said Isaac, by reason of some defect in the proceedings of said administrator in the settlement of said estate; and that said Rhoderick and the heirs of said Daniel, threatened to institute suits for the recovery of all the lands of said Daniel, which had been sold and warranted by said Isaac in the different towns in this state, which would be a source of endless litigation and expense, and whereby the petitioners would be subjected to great loss—praying that said deeds may be confirmed, or that a committee might be appointed to hear and report, and that whatever should be equitable in the premises might be decreed and ordered.

Plea in abatement to the petition, in nature of a demurrer. And judgment—that the plea in abatement was sufficient.

By the court—The petitioners have an adequate remedy at law, by applying to the court of probate, and taking administration de bonis non upon the estate of said Daniel, deceased, said estate not having been legally closed at the probate; so far as said Isaac, the former administrator, had properly and regularly administered, must be allowed to be authentic. The court of probate is the only proper court to determine and allow the debts due from said Daniel's estate, which said Isaac has bona fide paid, and what allowance ought to be made for what he has well done, and to give an order to sell so much of said Daniel's estate in the hands of his heirs, as shall be sufficient to pay said debts and charges. The determination at law that the deed of bargain and sale of said three pieces of land in Hartford to Joseph Woodbridge, and by him conveyed to said Isaac Sheldon, was irregular and void, doth not vacate or affect the sale of other property or other lands which are good and valid; but said three pieces of land now belong to the estate of said Daniel, and the debts for which they were sold, were not paid thereby. It will be time enough to apply to chancery when in a legal course of pro-

ceedings, any insurmountable difficulties are met with which cannot be obviated at law. The administrator, said Isaac, may be charged for the rents and profits of the lands, while they remained in his hands or his heirs; and the estate of said Daniel be charged with the interest of the monies advanced in payment of said debts.

Lynde vers. Patten, Lothrop, Phinehas Miller of Georgia, &c.

PETITION in chancery, praying, that the respondents might be compelled to disclose on oath certain facts, alledged in the petition to be within their private knowledge. Said Phinehas Miller resided in Georgia: It was moved in his behalf, that a commission might issue from this court to take his answer in Georgia.

Where a respondent is called upon in a petition to make discovery of certain facts on oath, the court will grant a commission to take his answer, if reasonable.

This was objected to by the petitioner, and insisted that he ought to come personally and be examined before the court.

By the court—The granting of the commission is discretionary with the court, and in this case it is reasonable; therefore let a commission issue.

Mitchelson vers. Enos.

PROSECUTION for a secret assault. Plea—not guilty. Issue to the jury.

The plaintiff objected to the defendant's witnesses, that they were interested

The plaintiff objected against certain witnesses of the defendant—that they had entered into a written agreement, which was in the possession of the defendant, which would hold them to be at an equal share of the expense of this suit, and introduced evidence to prove that this was the purport of the writing in the hands of the defendant; and challenged him to produce it, which the defendant refused to do. The court excluded the witnesses, and thereupon the defendant brought out the writing and offered to read it; plaintiff proved

in the suit, which would appear by a written agreement in the hands of the defendant, if he would produce it. The defendant refused to produce the writing. The plaintiff proved

that there was such a writing, and the court excluded the witnesses. The defendant then offered the writing and moved to read it, that the court would reconsider and admit the witnesses, but refused.

upon a motion made that the court would reconsider and admit said witnesses. This was objected to, as coming too late.

By the court—The defendant has had an opportunity to have produced the writing, and would not, although challenged—it is now too late, he must abide his own doings, and the decision of the court thereon.

Tolland County, February Term, A. D. 1797.

State *vers.* O'Brien.

The burning of a school-house is arson within the statute

INFORMATION for burning a school house in Union—and verdict, that the said O'Brien was guilty.

Motion made in arrest by the prisoner, after verdict, for the insufficiency of the information—because the burning of a school house was not a crime against the statute; that a school house was not mentioned in the statute, and that it did not come under the description of any of the buildings which were mentioned.

The motion in arrest was adjudged to be insufficient.

By the court—It may come under the denomination of a dwelling house or an out house—it is the dwelling house of the school, for the purposes of education. An out house is any house necessary for the purposes of life, in which the owner doth not make his constant or principal residence. Education and schooling are necessary to the well being of individuals and of society—a school house in this sense may be considered as a most important out house to all the inhabitants of the district who built it—and a burglary may be committed by breaking open a school house in the night season, to steal the books, paper, or other writing utensils deposited there.

Town of Bolton *vers.* Town of Haddam.

ACTION of debt by book, for expenditures in supporting a negro man, claimed by the plaintiffs to belong to the town of Haddam. Issue to the jury. Verdict for the plaintiffs.

A manumitted slave for life, is settled in the town to which his master belongs.

In this case it was determined that a slave for life was settled with his master; and if manumitted by his master with or without a certificate from the selectmen, or by having enlisted and served in the army with his master's consent; that he continued to be a settled inhabitant in the town where he was settled before, until by legal means he becomes settled in another town.

Lillie *vers.* Jacob Wilson.

ACTION of ejectment. Plea—no wrong, &c. Issue to the jury.

The plaintiff's title was the levy of an execution granted upon a judgment of a justice against John Wilson, for seven pounds debt and the cost, and levied on the 17th of September A. D. 1795, and recorded the 12th.

The defendant's title was a deed from the same John Wilson to Ebenezer Hunt, dated 28th of February 1795, and recorded March the 3d, A. D. 1795.

The plaintiff contended that said deed was fraudulent and void as to creditors; he said John having gone off, and left no clear estate wherewith to pay and satisfy his creditors. Silas Mibbard was offered as a witness, and objected against by the defendant that he was a creditor to said John.

By the court—This may go to his credit, but not to his competency, unless he has attached or levied upon some part of the land contained in said deed.—*Vide* Lee *vs.* Abbee at Windham, March term, A. D. 1796.

In an action of ejectment where the title of the plaintiff is challenged to be fraudulent, a creditor of the debtors from whom the plaintiff took the land, altho' the debtor is a bankrupt, may be a witness, unless he has taken hold of the land. In evidence of title under the levy of an execution, the plaintiff must produce the judgment if required.

The defendant challenged the record of the judgment, upon which the execution issued, to be produced; and it appeared that the judgment was rendered upon a note for more than sixteen dollars, and witnessed by one witness only, of which said justice had no jurisdiction.

The plaintiff withdrew the suit.

Eleazer W. Phelps *vers.* Asa Blood.

An endorsee of a note must use due diligence in order to subject the endorser; he must give notice to the endorser of the non payment of the note, in a reasonable time.

ERROR to reverse a judgment of the county court, in an action, Blood *vs.* Phelps—declaring, that the defendant on or about the month of August A. D 1792, for a valuable consideration, sold, assigned, and endorsed to the plaintiff, a note in his name, against Davenport Wheelock, of Orford, for forty-eight bushels of wheat, payable on the 1st of January then next, and warranted the same to be good and collectable. That before said note became payable, said Davenport Wheelock, left said Orford, and went to parts unknown, without leaving any property which could be found to pay said note, and the plaintiff never could collect one farthing of said note, whereby the plaintiff had lost all benefit thereof; of all which he gave the defendant notice on the 1st day of January A. D. 1794, and requested payment; and thereupon the defendant became liable to pay said note, and in consideration thereof assumed and promised.

Plea—Non assumpsit. Issue to the court, who found that the defendant did assume and promise, &c. and thereupon gave judgment for the plaintiff to recover.

Error assigned—That said judgment ought to have been for the defendant; for that the plaintiff's declaration was insufficient in the law, for by the plaintiff's own shewing therein, he was not entitled to recover.

Plea—Nothing erroneous. And judgment—Manifest error.

For the following reasons, it doth not appear that there was any other warranty of said note, than what the law implies, in every assignment for value received; it doth not appear that the plaintiff has used due diligence, or taken any measures to find or to recover said debt of said Davenport, vide *Deming vs. Norton, Kirby, 397*. Further, no notice was given of said Davenport's failing to pay until the 1st of January 1794, a year after said note became due, which was not within a reasonable time, whereby the plaintiff took the risk of the debt on himself. It is required that an endorsee of a note should conduct reasonably and fairly with it, in order to subject the endorser—and it is contrary to reason and justice that an endorsee may neglect all means of recovering the debt of the promisor, and omit giving notice of the non-payment any length of time he pleases, and yet hold the endorser liable and responsible.

Windham County, March Term, A. D. 1797.

Tyler vers. Tyler.

WRIT of error to reverse a judgment of the county court in an action of *Tyler vs. Tyler*, wherein the writ was directed by the authority signing it to one Camden, an indifferent person, to serve and return—and by whom said writ was served and returned.

A minor not capable of having writs directed to him to serve as an indifferent person.

The defendant plead in abatement, that said Camden, to whom said writ was directed to serve as an indifferent person and by whom only said writ had been served, was at the time of making said service, a minor under the age of twenty-one years.

The plaintiff demurred to the plea—and the judgment of the county court was, that said plea was sufficient.

Error assigned, was, that the plea was insufficient. Nothing erroneous plead—and judgment, that there was nothing erroneous in the judgment complained of.

By the court—A minor is not a person in law, capable of having writs directed to him as an indifferent person to serve and return.

William Williams, Esq. Judge of Probate *vers.*
John Fitch.

Upon a hearing in damages upon an administration bond, the bondsmen was allowed to contest the debts allowed by the commissioners.

SCIRE FACIAS against said Fitch, as bondsman for Mary Wales, executrix of the last will of Nathaniel Wales, Esq. alledging that since a former recovery upon said bond, other and further breaches had happened in not paying to certain creditors, viz. Huntley, &c. their respective averages, amounting to £321-16-8, as made out and ordered by the court of probate: That said Nathaniel's estate was insolvent, and said executrix was dead, and that said debts had not been paid, &c.

To this scire facias the defendant plead that said Mary had kept and performed the conditions of said bond, and all the orders of the court of probate given her for settling said estate, since said former judgment. Issue to the court.

An extra judicial certificate from the judge of probate of something that happened in the course of administration, which was not a matter of record, was offered in evidence, but not admitted by the court; nor was the judge admitted as a witness to testify the same thing by parol; for a court must speak by its records.

The court found that said executrix had not kept and performed all the conditions in said bond and orders of the court of probate, &c. and upon a hearing in damages, it was contended by the council for the defendant, that the executrix had a right by law to contest the debts of the several creditors, except judgment creditors, at common law, notwithstanding they had been allowed by commissioners, and as

the defendant came in her place and was responsible in her behalf ; and he ought to have the same liberty to contest the debts in this suit, on a hearing in damages, as she would have had, and that the court would not give judgment against him, only for the average of those debts which had been ascertained by judgment, or should by the court be found to be justly due.

By the court—The defendant hath right to contest those debts in this action ; but the allowance of the commissioners will be considered as evidence of the debts until the contrary is made to appear ; and nothing appears in this case but that said debts are just. The court gave judgment for the amount of the average found due to the creditors mentioned in the declaration and the interest from the time the order for payment made out by the judge of probate, was delivered to the executrix.



New-London County, March Term, A. D. 1797.

Joseph Otis *vers.* Hezekiah Abel, jun.

ACTION of ejectment, for eight acres of land, described in the declaration.

Plea—No wrong or disseisin. Issue to the jury.

The plaintiff offered as the evidence of his title, a copy from the records of the superior court, of an execution which issued on a judgment of said court, in favour of the plaintiff, against one — Fish, who owned this land, and of the officer's endorsement who levied upon said land, and of the certificate of the clerk of the town in which the land lay, that the same was recorded in the records of said town, duly authenticated by the clerk of the superior court.

A copy from the records of the superior court of an execution which issued from said court, and the officer's return who levied the same on land, and of the certificate of the town clerk that the same had been recorded in the records of the town in

which the hand
lay, good evi-
dence of title.

The defendant contended that this was no evidence, that said execution and officer's return, had been recorded in the records of said town, without which the plaintiff's title was deficient—and that a copy from the records of the town was the only evidence of their having been recorded there. This objection was ruled to be insufficient—and verdict and judgment was for the plaintiff to recover.

John Hill Miller *vers.* Jacob Riley.

An endorser
of a bill of ex-
change liable
to the endorsee
in case of a pro-
test, on the
ground of the
negotiability of
such bills in
this state.

ACTION, declaring that on the 29th of July A. D. 1796, Frederick Whiting, was justly indebted to Pardon T. Taber, 2250 dollars, and drew a bill according to the custom of merchants, in his favor upon Isaac Riley, of New-York, in the words following, viz. "2250 dollars—New-London, 29th July A. D. 1796, sixty days from the 3d of August next, pay Pardon T. Taber, or order, two thousand two hundred and fifty Spanish milled dollars, value received, and place the same as per advice to account of your humble servant Frederick Riley,"—to Isaac Riley, New-York. Which bill the said Taber received, and for a valuable consideration endorsed and assigned to the defendant, and the defendant in like manner, according to the custom of merchants, endorsed and assigned the same bill to the plaintiff, for a valuable consideration; and the plaintiff on the day said bill was payable, presented the same to said Isaac Riley, for acceptance and payment; but said Isaac refused to accept or pay the same, and on the 5th of October instant, the plaintiff caused said bill to be protested, by a notary public, for non acceptance and non payment; of all which the defendant had been duly notified, and payment requested of him, whereupon the defendant had become liable to pay said debt, and being so liable, did according to the custom of merchants, in consideration thereof, on the 15th of instant October, assume and promise the plaintiff, &c. to pay said sum, and interest, and ten per cent. damages, which he had not performed.

Plea—Non assumpfit. Issue to the court.

The bill, endorsements, protest and notice, were produced and shewn in court. Two points were made by the defendant, 1st, That the law raised no promise to pay ten per cent. damages, nor even any damages over the lawful interest. 2d, That no action was maintainable by an endorsee against an endorser, by the laws of this state, for this would be to make paper securities negotiable, and in effect would be establishing a paper currency upon private funds, which is against the policy of our laws.

The court found that the defendant did assume and promise, &c. and allowed in damages the interest from the time of notice, and the cost of the protest.

By the court—The statute constituting the banks, makes notes payable to the bank, and notes payable to order, &c. and endorsed to the bank, negotiable as bills of exchange; which recognizes and admits that orders and bills of exchange, were negotiable in this state agreeable to the rules and principles of the common law, as applied to commercial transactions among merchants. Every endorsement is in nature of a new bill, and upon the same principle that a person in whose favor a bill is drawn, may resort to the drawer in case of a protest for non payment, every endorsee may go back upon his endorser.

Nancy Brown, &c. executors of Peleg Brown
vers. John M. Breed.

ACTION upon a note, dated the 9th of September 1775—in which the defendant promised to pay to said Peleg £31-12-2 on demand with interest. That the defendant his promise aforesaid disregarding, had never performed the same—damage, &c.

A jurymen returned as a talisman, by the sheriff who is a freeholder, but not to the amount of nine dollars ratable in the common list, not a suffi-

Plea—that the defendant made full payment of the note on which, &c. to said deceased in his life time, before the date of the plaintiffs' writ.

cient cause for
arresting judgment.

Verdict that the defendant did not make full payment of said note to said deceased, as the defendant in his plea had alledged, &c.

Motion in arrest—That Benjamin Hide, one of the jury, returned by the sheriff, and who tried said cause, was a freeholder, but not to the amount of nine dollars ratable in the common list, which was unknown to the defendant at the time of said trial. 2d, That the declaration was insufficient, in that it did not aver that said promise was not performed to the plaintiffs. 3d, That the issue was immaterial, and the debt might have been paid to the plaintiffs, the verdict notwithstanding.

The plaintiff replied, that the first exception was not true. The second and third were insufficient.

Judgment—That the motion in arrest was insufficient. The first exception was found to be true, but insufficient. The others were judged to be insufficient.

Abel Fitch *vers.* Joshua Lothrop and the turnpike company leading from Hartford to Norwich.

Errors in fact and errors in law cannot be joined. Travellers on the turnpike roads, liable for the toll whether they pass the gates or not.

ERROR to reverse a judgment of a judge in an action brought by said Lothrop, &c. *vs.* said Abel Fitch, declaring that by special act of the general assembly, made and passed at, &c. they were incorporated into a turnpike society and authorized and empowered to erect three turnpike gates on the road leading from Hartford to Norwich, after they had expended 4000 dollars on said road, and to collect at each gate a toll from every owner of a team carriage, nine pence; man and horse, three pence; who should pass by or through said gates; that the defendant travelled on said road with a team until he came near to said gate erected in Franklin on said road, and then passed by said road without paying said toll, whereby he became indebted to the plaintiffs the sum

of being the amount of the toll, and in consideration thereof assumed and promised, &c.

Plea in bar—that there had ever been beyond the memory of man, a public open highway or road leading from Norwich to Lebanon; and the defendant passing at this time with his team on said road, turned out of said road across the land of — Burchards, as he had occasion to do, and did not turn into said road again until he had passed said gate, which he had right to do.

The plaintiffs replied, that the defendant turned out on purpose to avoid paying said toll, &c. Demurrer.

Judgment—That the plaintiffs' reply was sufficient and for the plaintiff to recover, &c.

Errors assigned were, that the declaration was insufficient—2d, That the reply was insufficient—3d, That the judge who tried said cause was and is uncle to one of the plaintiffs—4th, That said judge lived in Norwich, and said court was holden in Norwich, and neither plaintiffs or defendant lived or dwelt in said Norwich.

Plea in abatement, that errors in law, and errors in fact, were joined, which by law may not be.

Judgment—Plea sufficient. Upon which the plaintiff moved to amend his writ without paying cost—by the court, he may amend, but it must be upon paying the cost, which being done, the errors in fact were struck out, and nothing erroneous plead. And judgment—That there was nothing erroneous in the judgment complained of.

By the court—The act of assembly has given the right to the plaintiffs, and created the duty upon all travellers passing the road, whether they go through or by said gate, to pay the toll, the gates are erected for the convenience of collecting it, but the law creates the duty.

Zaccheus Burnham, *vers.* William Barker.

The state duty must be paid on qui tam prosecutions.

An appeal lies from a judgment of a justice, in favor of the defendant upon a qui tam prosecution for theft.

ERROR to reverse a judgment of a justice, in an action quitam, brought by Barker against Burnham, for stealing a sheep, dated the 12th of December 1796.

The defendant plead in abatement, that there was no certificate that the state duty had been paid on said process. And judgment—*Plea insufficient.*

The defendant then plead not guilty. And judgment—that he was guilty, and that he pay ten dollars damage to the plaintiff, and a fine of to the town treasurer. The defendant moved for an appeal to the then next county court, which the justice denied.

Errors assigned—That the justice ought to have adjudged the plea in abatement sufficient, and ought to have granted an appeal.

Plea—Nothing erroneous. And judgment—*Manifest error.*

By the court—The law requires, that, upon all writs returnable for trial before a single minister of the law, a duty of one shilling be paid at the time of issuing, to the authority signing them. And that no writ on which a duty is laid as aforesaid, shall be valid or authentic in law, unless the authority signing it shall certify thereon in writing, that said duty is paid—there is no exception or saving in the law which exempts qui tam prosecutions from paying the duty—they are suits of the party, and under his control, and for his benefit, though the public is joined in the suit.

The law is, that when any person shall be condemned in any matter of a criminal nature before an assistant or justice of the peace (except for drunkenness, sabbath breaking, and profane cursing and swearing) he shall have liberty of an appeal to the next county court, provided, &c.

It seems as though nothing could be plainer than this law—and almost impossible to mistake the meaning of it.

John Goff, of Boston *vers.* John Billinghamurst.

ACTION of the case, declaring, that on the first of August A. D. 1795, the defendant was indebted to Benjamin Peters, of Boston, £60, for which he gave his note as follows, viz. "Boston, August A. D. 1795, I promise to pay Benjamin Peters, of Boston, or his order, sixty pounds lawful money, by the 1st of April next, with interest until paid, value received, John Billinghamurst," which note the said Peters for a valuable consideration on the 25th of March A. D. 1796, assigned and endorsed to the plaintiff, of which the defendant was notified on the 2d of November 1796, and requested to pay it to the plaintiff, whereby the defendant became liable by the laws of the state of Massachusetts, to pay said note to the plaintiff, and in consideration thereof the defendant assumed and promised.

An endorsee may maintain an action in his own name against the promisor, upon a note given in the state of Massachusetts, where such notes are negotiable.

Plea in abatement—That said Benjamin Peters, died before notice of said assignment was given to the defendant, and that his executors only, and not the plaintiff, had right to bring and maintain an action for said note.

Demurrer to the plea. And judgment—Plea in abatement insufficient.

By the court—By the laws of the state of Massachusetts, making notes negotiable, a right was vested in the plaintiff, as endorsee of said note, to sue it in his own name, and he may prosecute that right in this state, although the laws of this state doth not create such a right, yet it will give effect to rights vested by the laws of other states—Vide *Robert Bown vs. Olcott, &c.* Hartford, February 1796.

Christopher Starr *vers.* Tracy, Moors, &c.

A witness not compellable to testify against his own interest. The goods of an absconding debtor, covered by a fraudulent conveyance, are liable to a foreign attachment.

Motion in arrest that one of the jury was nephew to a creditor in a foreign attachment served on the plaintiff, adjudged insufficient.

ACTION of trespass, declaring, that on the 30th of December last, the defendants, without law and right, by force and arms, broke and entered the plaintiffs' store in his actual and lawful possession, and took and carried from thence goods, wares and merchandise, particularly enumerated in the declaration, to the value of 2945 dollars: Damage 3500 dollars. Writ dated 19th January A. D. 1797.

Plea—Not guilty. Issue to the jury.

The store was owned by — Peabody, and let by parol lease to Nathaniel Eaton, for a term not expired; on the 26th of December A. D. 1796, said Eaton failed and absconded. Previous to his absconding, he gave a bill of sale of all his goods in said store to the plaintiff; conditioned that if he paid the plaintiff what he owed him, and saved him harmless wherein he had endorsed or was bound for him, said bill of sale was to be void. It was also further provided and agreed, that whatever said goods should exceed, what said Nathaniel owed the plaintiff, or should be obliged to pay for him, the plaintiff should pay to William Eaton, a brother and creditor of Nathaniel Eaton, aforesaid—bill of sale dated 26th of December 1796.

The plaintiff claimed these goods to be his, in virtue of said bill of sale.

The defendant Tracy, was a constable, and had lawful writs of attachment in favor of said Moors, and others, by force of which he broke open said store, there being no person in it, and attached the goods as the property of said Nathaniel Eaton, and took them into custody. The defendants attacked said bill of sale as being fraudulent and void.

The plaintiff called upon Mr. —, to testify who was a creditor to said Nathaniel Eaton, and who had attached a part of the same goods, and was interested in the same point as to the bill of sale, with the defendants—to this the defendants could not object,

because produced by the plaintiff to testify against his interest—but the witness claimed the privilege of being exempted from testifying any thing contrary to his interest. By the court—a witness may not deprive a party of his testimony by any voluntary interest he may take upon himself, as by wagering, &c. but a witness is not obliged to disclose what will make against him.

The plaintiff then offered to give in evidence certain copies of foreign attachments left with him as agent and factor to said Nathaniel Eaton, previous to the goods being attached by the defendant Tracey.

To this the defendants objected—who contended that this would be an absurdity, as the plaintiff claimed the goods to be his under the bill of sale—and by these attachments he claimed to hold them not as his own, but as Eaton's, for the benefit of his creditors; which claims were inconsistent. 2d, That the bill of sale if fraudulent as to creditors, was good and valid between Nathaniel Eaton and Starr—that Eaton could not avoid it, or claim against it; and that the creditors by foreign attachment could only claim and recover what Eaton himself might. The act against fraudulent conveyances, declares all fraudulent conveyances of lands, &c. and all such bonds, suits, judgments, &c. made to avoid any debt or duty of others, (as against the party or parties only, whose debt or duty is so endeavoured to be avoided, their heirs, &c.) to be utterly void—the conveyance, &c. is good and valid, to all intents and purposes, against the grantor, his heirs, and every other person, except creditors, whose debts are thereby endeavoured to be avoided. That the preamble of the act, entitled “an act for the recovery of debts, out of the estate or effects of absent or absconding debtors,” is for the better preventing of fraud and deceit, sometimes designed and practised by ill minded debtors, who betrust their goods, estate and effects, in the hands of others, &c. to secure them to their own use, and thereby defeat their creditors, &c. It was said that this statute extend-

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NEW-LONDON COUNTY,

ed to cases of trustment and bailment, but not to the case of fraudulent conveyances and transfers, they being provided against by the other statutes ; and if the plaintiff might protect these goods, by said copies, he would protect himself against said copies by the bill of sale.

By the court—They were admitted for the following reasons ; if these goods were the property of Nathaniel Eaton, covered over with a fraudulent bill of sale, in the hands of the plaintiff, he was bailee of Eaton, for the benefit of his creditors indiscriminately, and the goods might be attached if to be got at, or secured by copying said Starr as Eaton's agent, &c. and the bill of sale would be equally unavailable to protect said goods against the copying, as against the attaching creditors ; and the only inquiry would be which was first. If it is a bona fide bill of sale, it is a condition, alone ; first to satisfy and indemnify the plaintiff, and to pay the surplus over to William Eaton, his brother ; this the creditors would have right to contest with said William Eaton ; at any rate it goes to shew that the plaintiff is holden for the goods or the amount of them, by prior liens laid upon them.

Verdict for the plaintiff, and two thousand dollars damages.

A bill of exceptions was filed to the opinion of the court in admitting said foreign attachments.

The defendants made a motion in arrest of judgment—That David Green of Boston was one of the creditors of said Nathaniel Eaton, who had left a copy of his foreign attachment against said Nathaniel Eaton, previous to said Tracey's attaching them, and for security of which the plaintiff claimed to hold them ; and David Nevins one of the jurors returned by the sheriff, and who tried said cause, was and is nephew by marriage to said David Green, having married his niece who was still living, and was by law disqualified as a juror to try said cause.

The plaintiff replied, that the motion was not true and insufficient.

Judgment—That the motion in arrest was true, but insufficient in the law. Kirby's Rep. 279, Woodbridge *vs.* Raymond.

William Parkhurst, &c. *vers.* James Powers.

ACTION declaring that the plaintiffs had a controversy with the defendant, respecting a voyage to the West-Indies, in the sloop Industry, of which the defendant was master; and also respecting his account of said voyage, which he had rendered, and in order to settle and put a final end to said controversy, the plaintiffs and defendant, on the 9th of June, agreed and submitted said controversy to the arbitration and final award of Jared Starr and Henry Newman, they to choose a third man in case of disagreement. That on the 10th of June, said arbitrators having duly notified said parties, heard them on the matters submitted, and made and published their award, in writing, under their hands, as follows, viz. "We find that said Powers did not follow his orders received from his owners, the said William Parkhurst, &c. to the damage of his owners £108-10-9—Jared Starr, Henry Newman, arbitrators." And thereupon the defendant became liable to pay said sum, and in consideration thereof assumed and promised.

The award of arbitrators ought to determine the matters submitted, and ought to be mutual and final between the parties.

There was a demurrer given to the declaration, and judgment, that the declaration was insufficient.

By the court—The arbitrators have considered only one of the matters submitted to them, viz. the voyage and the breach of orders. The award is not mutual nor final. Neither have the arbitrators awarded the defendant to pay any thing, but only find that the defendant's not following his orders was £108-10-9 damage to his owners, which may be true and yet there be nothing due to the plaintiffs. If there had been, they ought to have awarded it to them.

Middlesex County, July Term, A. D. 1797.

Matthew Smith, 2d, administrator *de bonis non*, of Samuel Gates, 2d, deceased *vers.* Noadiah Gates, executor of the last will, &c. of Anne Gates, deceased.

The use and improvement of a personal chattel, may be given by will, without involving the gift of the thing itself.

This judgment reversed in the supreme court of errors.

ACTION of the case, declaring, that said Samuel Gates in and by his last will and testament, proved and approved, gave to his wife the said Anne, the use of one third of his dwelling house with the appurtenances, during her natural life, two cows and sixty dollars annually out of his estate; and whatever should remain of his estate after his debts and expenses should be discharged, he gave and bequeathed to his beloved wife Annie, to be used and improved by her during her widowhood—That the residuary legacy amounted to £318-4-5 lawful money, which was paid to the said Anne by the executors of said Samuel Gates in cash, that she ever remained his widow, and was now deceased, having made her will, and appointed the defendant her executor, who had accepted said trust, and caused her will to be duly proved and approved—That said Anne in her life time, spent no part of the principal sum of said residuary legacy paid her as aforesaid, but left the same entire, and which, upon her decease, came into the hands of the defendant as her executor, and is part of the estate of said Samuel Gates, 2d, unadministered, which sum had never been paid to the plaintiff, though often requested, and especially on the 20th day of February, A. D. 1794, that thereupon the defendant became liable to pay the same, and in consideration thereof assumed and promised, &c. Damage £318-4-5.

The defendant plead in bar—That said Samuel Gates, 2d, died in December, A. D. 1788, having made his will, since proved and approved, in and by which he gave divers legacies to sundry persons, and recites the will, in which are the particular devises

and bequests to his said wife alledged in the declaration, with this clause, viz. "What I have now given to my wife together with the provision I shall hereafter make and ordain for her, is given according to her desire, in lieu of dower, the law would give her. Lastly, whatever shall remain of my estate after my debts and expenses shall be discharged, I give and bequeath to my beloved wife Anne, to be used and improved by her during her widowhood." And appointed his executors as by said will, &c.—That said residuary legacy was paid to her, amounting to £318-4-5 lawful money, by said executor, which she received, used and improved during her life, she remaining a widow. That previous to her death, she made and published her last will and testament, and gave all her estate, this being a part, to the first ecclesiastical society in East-Haddam, for the support of the gospel ministry, and appointed the defendant executor, who accepted said trust and caused said will to be proved and approved.

The plaintiff demurred to this plea in bar, and judgment in December term, A. D. 1797, that the defendant's plea in bar was insufficient; and upon a hearing in damages, found that the principal sum received, remained at her death, and came into the hands of the defendant, and judgment was for that sum accordingly.

By the court—The only question in this case is, respecting the construction of that clause in the will of Samuel Gates, 2d, viz. whatever of my estate shall remain, &c. I give and bequeath to my wife Anne, to be used and improved by her during her widowhood. Had the bequest stopped at the words, my wife Anne, it would have been an absolute gift, but the after words in the same bequest, to be used and improved during her widowhood, qualifies the gift, and restrains it to the use only, and that for a limited time, during her widowhood; and had she married, her right even to the use would have been determined; and had the use been given her for life, the terms would have been much stronger, yet in

that case her interest would have terminated at her death.

By the laws of this state, the personal estate, after paying debts and legacies, vests, upon the decease of a person, in the same heirs and in the same proportion, as the real estate, except only as to the dower of widows: in this case, upon the decease of said Samuel Gates, the property in the residuary legacy vested in his heirs at law, subject to the enjoyment, use and improvement of the said Anne during her widowhood; and it lasted her life time, whatever then remained was theirs, as she never married again. The intention of the testator is clear and express, and there is not room for a particle of doubt on the subject. The only question that remains, is, whether such intention is consistent with the policy of law, in that, he has not declared to whom the property should go upon her marriage or decease. The answer is, the law has done this, as clearly and certainly as he could have done it, viz. his heirs, and this he knew very well, and that no provision in that respect was necessary. The idea, that the use of a personal chattel, may not be given for a limited time in any case without involving the gift of the thing itself, is too absurd to require a moment's reflection to be rejected, or ever to obtain credit in this state.

This judgment was reversed in the supreme court of errors, June, A. D. 1798, for the following reasons:—After stating the case, the court of errors say, —Judgment of the superior court reversed. The material question in this case, which will be considered, is this, whether the bequest of the residuum vested in the widow an entire and complete property therein, defeasible only on her marrying again?

The policy of our law requires that property, and particularly personal property, which is a principal instrument of commerce, should be as far as possible transferable from one to another without impediment, and that it should be liable in the hands of the person who possesses it, to whom it gives a credit, for

the payment of his debts ; the creation therefore of uses and particular estates under various conditions and limitations, with reversions and remainders over upon personal property, cannot be favored ; because they are more or less injurious to society ; and the court will for this reason lean against their creation, either by deed or will, unless by words that are clear and definite. Whether the property in question would, in case the widow had married again, have reverted in the heirs, it is not necessary now to determine ; the will of the testator, would in that case have been certainly known, and that will ought to control so far as the policy of the law would admit ; but there are no words in this will which show that the testator intended the estate should revert in the heir, at the decease of the widow in case she had not married again. The words, to use and improve during her widowhood ; or so long as she remains my widow ; as they are commonly used in wills, are obviously intended, to prevent the estate from going into the hands of a stranger, whom the widow might think fit to marry ; a gift then to use and improve during widowhood, if widowhood continues through life, may fairly be construed to mean, the same as a gift to use and improve generally ; but a gift so to use and improve a personal chattel, is a gift of that chattel ; and it is for this plain reason, that the very existence of the thing is exhausted, and annihilated in the use and improvement.

But further, if it should still be contended, that the gift in the present case, to use and improve was in the actual event, no more than to use and improve during life ; still, as the use and improvement of chattles, gradually wears away and exhausts their being, the quantity of their being which might remain at the death of the widow, if any, would not certainly have been as great, or of as much value as when she received them ; and of course upon no principle could the heirs recover the capital first received, which by the judgment of the superior court they have done in this case.

The residuum having been paid by the executor in money, in this case, will make no difference, for the gift was of the residue of estate, to be used and improved, &c. and not the interest accruing on any capital sum; if that residue then had been in fact in money, which does not appear, still the widow was entitled to the principal sum, and not to the accruing interest only, and she might use that principal for her support in the purchasing such necessaries or conveniences, as she might think proper, which brings the matter to the same point, as if the residue had been paid in personal chattles.

CONTENTS.

Abandonment 400. R. Townsend, 4th ed. 1888

A

Abatement.

AN appeal abates, if the duty is not paid at the time of taking it. *Dee vs. Ely*, Page 11

An appeal abates, if the matters in dispute laid in the declaration do not exceed £20. *Fuller vs. Reed*, 188

A petition will not abate for an immaterial variance in the copy. *Heirs of Daniel Sheldon vs. Robbins, &c.* 190

In an action upon a note against a company, if they plead in abatement that one of the company is not sued, they must alledge that he belonged to the company when the note was executed. *Ainsworth vs. Dyer, &c.* 202

A petition to foreclose the equity of redemption, abates by the death of the petitioner. *Gray vs. Webb*, 257

A writ properly directed to an indifferent person to serve, if altered by the plaintiff to a different writ by new dating, &c. it will abate. *Chancy vs. Strong*, 369

A writ directed to a minor to serve, as an indifferent person, will abate. *Tyler vs. Tyler*, 519

Abfconding Debtors.

Cannot plead that the garnishee had not any of their effects, &c.

Bacon vs. Masters, 43

Same point. *Doty vs. Reed*, 81

A person who shuts himself up from his creditors, is an abfconding debtor. *Ives vs. Curtis*, 133

Action.

An action at law doth not lie against a county, but the remedy is upon the statute. *Lyon vs. County of Fairfield*, 30

C O N T E N T S.

An action lies for a father for enticing away a minor daughter and procuring her to be married fraudulently. *Hills vs. Hobart*, 48

An action lies for the husband for unskilfully amputating his wife's breast, notwithstanding she dies of the injury. *Cross vs. Gutberry*, 90

An action at common law doth not lie against a child for the support of a parent, but the remedy is upon the statute. *Gilbert vs. Lynes*, 168

In an action for a fraud in the sale of certain lands, if it appears that both parties had equal means of knowledge, no recovery will be had. *Strong vs. Peters*, 93

A demand for a breach of contract and for a tort, may not be joined in the same action. *Clinton vs. Hopkins*, 225

An action in the name of J. Brainard, upon the penal part of a bond given to him, as Sheriff, judged good upon demurrer. *J. Brainard, Esq. vs. Fowler, &c.* 316

Not cause of arrest, that a juryman returned by the sheriff, who is a freeholder, but not to the amount of nine dollars ratable estate. *Brown, &c. vs. Breed*, 523

Action on implied warranty } 407
Account.

Action of account not within the statute of limitations, though it counts upon a writing containing a promise to account. *Edward Pond vs. Peter Pond*, 41

An action of account, declaring on a special agreement how the money should be applied, good on special demurrer. *P. Smith vs. S. Smith*, 42

Accord.

One security may be plead in bar of another by way of accord and satisfaction. *Thatcher vs. Dudley, &c.* 169

Administrator.

An administrator is not liable on his bond for the avails of a note distributed to him with seven other legatees, but in account for each one's part. *Spencer, Esq. Judge of Probate vs. S. Church*, 80

Allowances made to an administrator by commissioners, may be disproved in an action on the probate bond. *Sherman, Esq. Judge of Probate vs. Talman*, 140

Administrators may have an action of debt, on a judgment recovered by the intestate. *Wogster vs. Bishop*, 230

The right of administrators to interfere with real property, is for the benefit of creditors. *Michael Lockwood, administrator of Jabez Lockwood vs. Gid. Lockwood*, 409

If an administrator purchases the estate fraudulently, it is void against creditors and heirs. *Sheldon, &c. vs. Woodbridge, &c.* 473

C O N T E N T S.

In an action upon the administration bond, the administrator may contest the debts allowed by commissioners. *Williams, Judge of Probate vs. Fitch*, 520

Agreement.

An agreement to forbear to sue for a time, no bar to an action. *Church vs. Smith, &c.* 138

A parol agreement executed on one part, not within the statute of frauds, &c. *Hall vs. Rowley*, 161

Same point. *Pinney vs. Pinney*, 191

Same Point. *Chittington vs. Fowler*, 387

A parol agreement extinguished by a written obligation. *Freeman vs. Beadle*, 429

Amendment.

A plaintiff may amend his writ upon payment of cost, though no plea in abatement is made. *Livingston vs. Abel*, 57

A plaintiff may amend his declaration as to the description of the land in an action of trespass, on paying cost. *Nobleton vs. Redfield*, 119

An amendment not allowed which would change the nature of the action. *Ross vs. Bates*, 198

An amendment which proposes to change the ground of relief asked for in a petition, from fraud to that of contract, not allowed. *Heirs of Samuel Miner vs. Woodbridge, &c.* 274

A defendant allowed to amend his plea, notwithstanding the case is on trial to the jury. *Simons vs. Payne, &c.* 406

An amendment, which wholly changes the nature of the action, not allowed by the statute. *Freeman vs. Beadle, &c.* 492

Apprentices.

May not be enlisted and taken away, by recruiting officers, without the master's consent. *Merriman vs. Bissell*, 378

Appeal from Probate.

An appeal lies in favor of heirs, legatees, &c. from a return of commissioners, allowing the claims of executors and administrators, to the superior court. *Fairweather vs. Curtis, &c.* 32

One appeal cannot embrace several distinct orders of court. *Watson vs. Hart and Perkins, Administrators*, 59

Same point. *Suly, &c. vs. Executors of Staples*, 74

Must point out the order of court appealed from. *Sarah Richardson, &c. vs. Zalmon Treat Richardson, Administrator*, 159

Persons not interested in the settlement of an estate, have no right to appeal from the orders of probate respecting it. *Sarah Richardson, &c. vs. Zalmon Treat Richardson*, 219

An appeal doth not lie for one creditor, because another creditor has more allowed him by the

C O N T E N T S.

- commissioners than he ought to have. *Banks vs. Bassett, Administrator,* 297
- A creditor whose claim is disallowed by commissioners, on an insolvent estate, has no right to appeal. *Williams vs. Latbrop, &c.* 364
- If a new guardian is appointed, pending an appeal from probate, in behalf of his ward, he will have right to enter and conduct the appeal. *Dema Clark, appeal from probate,* 383

Appeals.

- A cause not appealable in the county court cannot be remedied, by increasing the damages in the superior court. *Hurlbut vs. Rogers,* 60
- Where it appears from the declaration, that the matters in dispute do not exceed £20, the appeal will abate. *Petibone vs. Phelps, &c.* 137
- A party may not appeal from a judgment wholly in his favor. *Raymond vs. Barker,* 370
- A cause which was not appealable by law, in the county court, cannot be in this court. *Savage vs. White,* 377
- Action of trespass on land not appealable, unless the demand exceeds £20, or on a plea of title. *Shelton vs. Dutton* 440
- An appeal lies from a justice in a quitam action. *Burnham vs. Baker,* 526

Arrest of Judgment.

- Judgment arrested because the issue was immaterial. *Henshaw vs. Clark,* 4
- The court will not set aside a verdict for the defendants on motion of the plaintiff, because one of the jurors was his nephew, known to him and concealed at the time of impannelling the jury. *Parmele, &c. vs. Gutbery,* 185
- Judgment arrested because one of the jurors had previously given his opinion in the cause. *Smith vs. Ward,* 302
- It is not a sufficient answer to a motion in arrest which contains matters of fact and of law, to say it is overruled. *Bird vs. Bird,* 411
- After a defendant has admitted the plaintiff's right of action and referred it to referees by rule of court, and the referees have awarded against him, he cannot move in arrest that the plaintiff had no right to bring the action. *Sardam vs. Reed,* 429
- It is no cause of arrest that a jurymen's estate was not rated or put into the list. *State vs. Richard Doan,* 451
- Motion in arrest not receivable after twenty-four hours from accepting the verdict. *Danil Sheldon, &c. vs. Joseph Woodbridge,* 473
- Motion in arrest that one of the jurors was nephew to one of the creditors in the foreign attachments served on the plaintiff, judged to be insufficient. *Starr vs. Tracy, &c.* 528

C O N T E N T S.

Arrests.

A thief may be arrested without warrant. *Wrenford vs. Smith, &c.* 171

Arson.

Burning of a school house is arson within the statute. *State vs. Obrien,* 516

Assault and Battery.

In an action for an assault and battery committed on the parade on training day, the defendant allowed to give evidence of the plaintiff's disorderly conduct. *Tomlinson vs. Booth,* 32

The defendant not allowed to give evidence of provoking words, which were spoken previous to the time of the assault, unless for explanation. *Guernsey vs. Morse,* 252

Assumpsit.

This action lies against executors for taxes due from their testator. *Chauncey Bulkley, &c. executors of Oliver Bulkley vs. Clark,* 60

It will not lie in favor of a collector against a person that is living. *Simeon Smith vs. Crocker,* 84

It will lie for money advanced, although the plaintiff might have had another remedy. *Betts vs. Hilliard,* 131

It lies for a legacy charged on lands. *Warren, administrator of Sarah Moor vs. Rogers,* 156

It lies for money loaned to a third person on the request of the defendant by letter, &c. *Thomas Newson vs. Lemuel Storrs,* 441

Attachments.

May be directed to indifferent persons to serve. *Edward Tyler vs. Atwater, &c.* 72

Served as a summons, good to hold the defendant to trial. *Jehu Brainard, Esq. vs. Wilford, &c.* 130

The body and estate not to be holden by same attachment together. *Daniel vs. Wilson,* 346

Attornies.

After an attorney has appeared in the county court and is there entered of record, attorney to the plaintiff, and the cause is appealed into the superior court, it is too late to challenge his power. *Coskran vs. Leister,* 348

Audita Querela.

An insolvent debtor, by the laws of the state of New-York, imprisoned in this state on an execution for debt contracted before his insolvency, may be discharged, by audita querela. *Pestet vs. Seaman,* 178

C O N T E N T S.

Auditors.

- A return, that the defendant shall pay a sum to the plaintiff without finding that he owed, is insufficient. *John Thomas vs. Mary Alsop*, 12
- May report a balance in favor of the defendant. *Richard Dickerson, administrator, &c. vs. Whitelsey*, 121

Awards.

- An award that covers more time than the submission, is good notwithstanding, if no injury is done thereby. *Pomroy vs. Kibbe*, 92
- An award by rule of court, a bar to antecedent claims. *Park vs. Halscy*, 100
- An award must decide the matters specially submitted, it must be certain, mutual, and final. *William Carter vs. Daniel Ross, &c.* 507
- Same point. *Parkhurst vs. Power*, 531

B

Bail and Bail Bonds.

- Special bail may not be required in the superior court, which was waved in the county court. *Halscy vs. Fanning*, 101
- If the statute of limitation is pleaded to a suit on a bail bond, the court will admit evidence of the day, on which the judgment was entered up. *Clark vs. John Ely*, 380

Bastards and Bastardy.

- A woman's being put to the discovery of the truth in the time of her travail, an essential requisite to her recovering maintenance for a bastard child. *John Warner vs. Anubab Willy*, 490
- In a case of bastardy, the court must answer the issue, fix the sum of the bond to be given to indemnify the town, and limit the time of the maintenance. *Benedict vs. Sarah Roberts*, 496

Bankrupts.

- May have an action, to recover damage for wrongs committed before the bankruptcy. *Stanly vs. Duburst*, 52

Baron and Feme.

- The feme need not join in an action for the rents and profits of lands holden in her right, during the coverture. *Nathaniel Chaney vs. Ambrose Strong*, 369

Bonds.

- The obligor in a bond, must perform the condition, if lawful and possible, or forfeit the penalty. *Holdridge vs. Pelletiah Allen, &c.* 139
- Annual payments secured by bond, may be suspended by a special agreement. *Filer and wife Jerusha vs. Bissel*, 347

C O N T E N T S.

Book Debt.

The defendant's book is not saved out of the statute, by his being sued, and the action after dropped. *Wetmore vs. Smith.* 6

Articles omitted in a settlement, not recoverable in an action on book. *James Rogers vs. William Moore,* 58

This action lies for expenditures made for the joint benefit of both plaintiff and defendant to recover a moiety. *Bowen vs. Dunn,* 59

The plaintiff not admitted to testify to a special agreement thereby to charge the defendant. *Johnson vs. Gunn,* 130

Necessaries advanced by the guardian to his ward, may be charged and recovered in this action. *Mills vs. St. John, &c.* 188

The statute of limitation may be given in evidence under the plea of owe nothing. *Penelope Miller vs. Grosvenor,* 208

If an administrator pleads that the deceased owed nothing at the time of his death, if he did owe, the court will give judgment for the plaintiff, although the plaintiff's book was outlawed, before the action was commenced. *White vs. administrators of Judson,* 301

A mortgage to secure a debt by book, takes it out of the statute. *James Clark vs. Benjamin Bull, administrator of Harpen.* 329

Bridges.

An action at common law lies against a town for damages suffered by a defective bridge. *Lewis vs. town of Litchfield,* 436

C

Collectors.

Several collectors cannot join in a deed of land, sold by them severally for taxes. *A. Humpbry vs. Virgelius P. Boge,* 347

Confervator.

A confervator is liable upon the contracts he made for the maintenance of the impotent person, after he is displaced from office. *Campbel vs. Crandal,* 371

Chancery.

Will relieve against a mistake in filling up a life policy. *Mehitable Parsons vs. S. T. Hofmer,* 1

Will grant relief against obligations and executions obtained by fraud and imposition. *Joshua Henshaw vs. Atkins,* 7

It will not sustain a suit, where the party has adequate remedy at law. *James Bird vs. Holaberd and wife,* 35

Will relieve against accidents. *Wolcott vs. Noah Day,* 62

CONTENTS.

- It will not interpose to relieve a party against his own negligence. *Thomas Belding vs. Mary Silliman*, 75
- It will grant relief against mistakes in drawing of deeds. *Cook vs. Preston*, 78
- Chancery will grant an injunction upon an execution to prevent an ill use being made of it, and to save a circuitry of actions. *Colt, &c. vs. Asbel Cornwell*, 109
- Upon applications to chancery, to take depositions in perpetuum memoriam rei, the adverse party is to be notified. *Amos Payne*, 156
- Chancery will relieve against defects in a legal title. *Bundy vs. Sabin*, 209
- Chancery will relieve against unconscionable bargains obtained by imposition and fraud. *Whipple vs. McClure*, 216
- An administrator who redeems an estate in virtue of a parol agreement made with the intestate, and takes a deed to himself, is a trustee for the heirs, and he or his heirs will be compelled in chancery to convey it to said heirs, on being paid what he advanced for it. *Heirs of Daniel Sheldon vs. heirs of Isaac Sheldon*, 254
- If a petition asks for a redemption on the score of fraud in the grantee in not executing a bond of defeasance as agreed, it cannot be supported by proof that such bond was given and is lost. *Heirs of Samuel Minor vs. Ebenezer Punderfon, &c.* 274
- A court of chancery doth not create a title where there is none, but it compels persons who have got the legal title by injustice and fraud, to restore it to those who in justice ought to have it. *Jacob Willet vs. Seth Overton, &c.* 338
- Chancery will order lands unfairly sold by an administrator on an insolvent estate to the prejudice of the creditors, to be reconveyed. *Jonathan Bull, Esq. vs. Nathaniel Skinner, &c.* 348
- Chancery will grant relief against the mistakes of a scrivener in drawing a deed, and also the person who attempts unjustly to take advantage of it. *Elmore vs. Austin*, 415
- Chancery refused to relieve a purchaser, who had a bond for a deed, upon his paying certain notes given for it, one of said notes being paid and the land taken back, unless all the notes were paid. *Mary Porter, &c. vs. Jabez Bacon*. 417
- Chancery will not relieve against a bona fide purchaser for valuable consideration, without notice. *Cressy vs. Lillie, &c.* 420
- Chancery will grant relief where injustice is done by mistake, or otherwise by an award. *David Doty vs. Thomas Judson, &c.* 427
- Where a testator has covenanted not to alter his will in favor of a son, and afterwards is enticed to do it by another son to the prejudice of a third person, chancery will grant relief. *Exra Holcomb, &c. vs. Nathaniel Gillel*, 448
- A petition may be brought in the county where the land lies, tho'

C O N T E N T S.

neither of the parties live there.

David Manwaring vs. Jonathan Harris, 456

Where the consideration of a note has failed or become impossible to be performed, chancery will grant relief. 464

A petition which asks to be relieved against a note on the ground of fraud; must state the facts which constitute the fraud. *Samuel Bull vs. Caleb Bull, &c.* 476

Chancery will not relieve against a bond for a deed of land, where the parties have mutual remedies, and the bond is assigned.

Grant, &c. vs. Halkins, &c. 479

Courts of chancery will not judge over the heads of arbitrators any more than courts of law. The party has adequate remedy at law for corruption and partiality in arbitration, or mistakes in awards. *Jonathan Miller vs. Gordon Whitmore,* 488

Chancery will relieve against mistakes in drawing of deeds. *Sanford vs. Wastburn, &c.* 499

Chancery will not interpose in the settlement of an estate where the party has adequate remedy in a course of law. *Anna Sheldon, &c. vs. Roderick Sheldon, &c.* 512

Chancery will grant a commission to take the respondent's answer. *Lynde vs. Patten, Miller, &c.* 515

Copies.

Official copies of a justice must be of something on record or on file

A a a a

in his office. *Candy vs. Twichel,* 123

Copies of record attested by the register only, not admitted without a certificate of the judge that he was register. *Spegail vs. Perkins, &c.* 274

A copy of the record of a deed is admissible as evidence of title, where the original is not in the power of the party to produce. *Parker vs. Smedly, &c.* 286

Costs.

Allowed to a respondent, who was cited to the court, although the petition was not addressed to it. *Hilliard vs. Nichols,* 31

Full cost allowed where title to land was the principal matter in dispute. *Granger vs. Hancock.* 88

Allowed to the defendant in quitam actions. *Reynolds, &c. vs. Stevens,* 136

Full cost in trespass, where the title to land was the principal matter in dispute. *Adgate vs. Storrs,* 160

Covenants.

In an action on the covenants of seisin, the plaintiff must shew not only that the defendant was not seized, but who was. *Wilford vs. Rose,* 14

Where the breach of covenant is specially assigned and the proof of it alleged to be by deeds and records, they are to be shewn on oyer. *Wilford vs. Rose,* 172



C O N T E N T S.

Contracts.

On a contract to go to a certain port, if there is sufficient depth of water, it is the duty of the defendant to find out whether there is sufficient depth of water or not. *Newton vs. Paddock*, 89

Creditors.

Who redeem the lands of their debtors within the year, which were sold for taxes, are entitled to the same equity as mortgagees. *Bacon vs. Curtiss*, 39

D

Damages.

Double damages recoverable of towns for injuries suffered by defective bridges. *Judith Bill vs. Town of Lyme*, 213

For breach of the covenants of seisin in a deed, the consideration paid for the land and interest, given in damages. *T. Castle vs. Jos. Pierce*, 294

In an action of trespass, removed from a justice upon a plea of title, treble damages are given, though they exceed the demand in the writ. *Hart vs. Brown*, 301

On a hearing in damages, the court cannot offset demands, arising out of mutual covenants. *Cockran vs. Leister*, 348

In assessing damages on a protest-

ed foreign bill of exchange, the custom of the place is to be respected. *Shipman vs. Miller*, 405

On a bond to pay certain debts which the plaintiff and defendant were jointly holden for, damages will be given for all the debts the plaintiff has paid and all he is liable for. *Johnson vs. Smith*, 414

Upon a revocation of a submission the direct damages only are to be recovered. *Wetmore vs. Lyman*, 484

Deeds.

A deed delivered to a third person for the use of another is good until dissented to. *Halluck vs. Busb*, 26

A deed delivered to a third person to hold till certain conditions are performed, is an escrow. *Baldwin vs. Potter*, 81

A deed of a farm of land, with reference to another deed, for a more particular description of it, containing covenants that it is clear of incumbrances, will subject the grantor if the farm is incumbered. *Russel vs. Case*, 211

A deed which has been prevented being recorded by fraud, shall when recorded, prevail against a later deed although recorded before it. *John H. Andrews vs. Michael Lockwood*, 239

The covenants of warranty in a deed do not extend to the quantity of acres unless so expressed. *Johnson vs. Moore*, 252

A deed from an administrator on an insolvent estate, in an action

C O N T E N T S.

- of ejectment, may not be attacked by evidence that the debts allowed by the commissioners were not just. *Jonathan Richardson, &c. vs. Frink, &c.* 270
- A deed not recorded, will not hold against a subsequent attachment, unless recorded in a reasonable time. *Welch vs. Gould, &c.* 287
- A deed to a society's committee, and their successors, for the use of the society, good.—A deed received and entered upon, received for record, though not recorded at length through the neglect of the register, till many years after, yet the record shall bear the same date. *Benjamin Judd, &c. society's committee vs. Woodruff,* 298
- A deed, until recorded at length, is no evidence of title at law, except against the grantor and his heirs. *Willet vs. Overton,* 338
- A deed originally fraudulent as to creditors, may become valid, as to bona fide purchasers for valuable consideration, without notice of the fraud. *Thomas Lee vs. Eliza Abbee,* 359
- Deeds of settlement, conveying to the sons their respective portions, and lodged in the hands of a third person to hold, and to deliver to the grantees upon the death of the grantor, are not defeated by an after deed, obtained by imposition, on the father, by one of the sons, notwithstanding it is first upon record. *Heirs of John Hall vs. William Hall,* 383
- A right of action, a controversy in the law, or suit in chancery relative to disputed title, an equity of redemption, if the mortgagor is ousted and dispossessed by the adverse possession and claim of the mortgagee, will not pass by deed. *Sanford vs. Wajbarn, &c.* 499
- ### Devise.
- A devise to a man and the heirs of his body, &c. by statute is an estate for life in the first donee. *Berden vs. Kingsbury,* 39
- A devise to a grandson of one third of the testator's estate, with a proviso, that if he dies before he arrives to the age of twenty-one, or before he has heirs of his body, said estate shall go to the daughters—the grandson takes the estate on his arriving to the age of twenty-one. *Job Williams, &c. heirs of Job Cowl vs. Moses Dickerson,* 191
- ### Defamation.
- The defendant permitted to give evidence from whom she first had the story. *Polly Leisler vs. Sally Smith,* 24
- But where a person has affirmed the scandal to be true, and that A. B. told him so, may not give evidence that A. B. told him so. *Austin vs. Hanchet,* 148
- ### Depositions.
- Taken within twenty miles of the vouches, in an action on the covenants of warranty in a deed, the vouches must be cited.—*Fowler vs. Norton,* 25

C O N T E N T S.

A deposition of the defendant introduced by the plaintiff, may not be taken back without the defendant's consent. *Henshaw vs. Clark and Smith*, 103

Discharge.

A discharge will not operate to cut off a promise of which it was the consideration. *Allen vs. Frißie and wife*, 76

Averments against the words of a discharge, that they do not mean what they say, is not admissible. *Fuller vs. Burrel*, 296

Declarations.

A declaration must alledge a contract made, and not merely the evidence of one. *Stephen Brunson vs. Ezekiel Brunson*, 73

If an obligation is lost or destroyed, the declaration upon it must shew the loss to excuse the not producing of it. *Kelly vs. Riggs*, 126

A declaration must comport with the writing declared upon, and shew that the money demanded has become due. *James Stoddard and Squire Geer vs. John Gates*, 157

That which is necessarily implied need not be averred. *Zalmon Booth vs. Uriah Wallace*, 247

Debt.

Action of debt will lie for a penalty upon a decree in chancery. *Samuel Drakefly vs. Thomas Root*, 138

If the sum to be paid, is referred to the judgment of a particular person, no debt accrues, till thus ascertained. *Baily vs. Tillingburgh*, 97

Debts contracted during the war after 17th September, A. D. 1777, reduced by the scale of depreciation. *Plumb vs. Alsop*, 224

The debts due from an estate represented insolvent and not found to be so, must be paid with interest. *Administrator of Nathaniel Green vs. Administrator of Lemuel Morehouse*, 242

Distribution.

The distribution of an estate, no bar to an action on the covenants of seisin against the executors. *Henry Crane, &c. heirs to Henry Crane vs. D. Brainard, &c. executors of Samuel Willard, sen.* 118

Dower.

Is paramount to the right of creditors or heirs, *Caldar, &c. vs. Bull, &c.* 50

A widow of a foreigner who was naturalized, and lived and died in this state, she ever remaining in a foreign country, absent from her husband through her default, is not entitled to dower. *Siflare vs. Siflare*, 468

State Duty.

Must be paid on quitam prosecutions. *Zacheus Burnham vs. William Baker*, 526

C O N T E N T S.

E

Ecclesiastical Societies.

Have right by their vote to apply the monies given to them for the use of the ministry or of schools. *Sage, &c. committee of first society in Chatham vs. White,* 111
The first ecclesiastical society has right to the monies granted to a town for ecclesiastical uses, when it consisted of but one society. *Sedgewick and town of Cornwall vs. John Pierce,* 431

Endorsers.

An endorser of a bill is liable to the endorsee, in case of a protest. *John Hill Miller vs Jacob Riley.* 522

Escape.

The county is liable for special damages, for the escape of a debtor through the insufficiency of the gaol. *E. Williams, Esq. vs. County of New-Haven.* 23
It is not an escape in the officer to permit a prisoner in execution to go at large upon security, that he will return to be retaken within the life of the execution. *Langdon vs. Chittington,* 133
If a prisoner who has the liberties of the prison on bonds, &c. goes out, it is a negligent escape. *E. Abel, Esq. Sheriff vs. Byvank, &c.* 174
If a prisoner escapes by means of

external force and not through any insufficiency in the gaol, the county is not liable. *Robert Paul vs. Tolland County,* 196

If a debtor in execution escapes from the officer with his consent, the creditor may have an alias execution and retake him. *Munson vs. Hills,* 324

An escape from gaol, by the procurement of the creditor, will not subject the sheriff. *L. Lord, Esq. Sheriff vs. Atwood,* 336

It is an escape in a debtor to leave the prison immediately after taking the poor prisoner's oath. *Wells vs. Lindley,* 481

Ejectment.

A lawful possession is a sufficient title to recover in ejectment against a tortious entry. *Richard Law, Esq. vs. Wilson,* 102.

If the agreement is, that the interest of a debt shall be paid annually, and if not, the mortgagee may sell the mortgaged premises, if the interest is not paid annually, ejectment will lie for the land. *Mary Alsop vs. Peck,* 224

If the plaintiff's title is the levy of an execution, he must produce the record of the judgment if required. *Lillie vs. Wilson,* 517

A copy from the records of the superior court of an execution returned levied upon land, and of the town clerk's certificate, that it is recorded in the town records, good evidence of title. *Joseph Otis vs. Henshiab Abel, jun.* 521

C O N T E N T S.

Error.

Errors in fact and in law may not be joined in the same writ. *Abel Fitch vs. Turnpike company*, 524

Estates for Life.

To be appraised upon execution as land. *Ephraim Wheeler vs. Isaac Gorbam*, 328

Estates Testate and Intestate.

Conditional claims against deceased persons' estate must be exhibited within the limitation. *Painter vs. Eliza Smith, executor of Daniel Grant*, 142

Claims of creditors must be exhibited within the time limited by the court of probate. *Brown, executor of Ephraim Brown vs. Reed*, 189

Evidence.

In an action for not completing a vessel by the day in the contract, the defendant in excuse may give in evidence, that by the contract the plaintiff was to furnish the iron, but did not, whereby it was impossible. *Bulkley, &c. vs. Brainard, &c.* 5

The justice and the jurors were admitted to testify, that the plaintiff's damages were not brought in and allowed in a former action tried in the state of New-York. *Stevens vs. Potter*, 83

On an information for counterfeiting guineas, evidence of the party's confession admitted, though the guineas were not produced. *State vs. Isaac Phelps*, 87

On an information for forgery, evidence that the prisoner had destroyed the writing, may be admitted to excuse the producing of it, or of his confession, to prove the forgery. *State vs. Ford*, 93

The records of the minister of the parish, evidence of a baptism. *Reynold Huntley and wife vs. John Comstock*, 99

A copy of the record of a power of attorney to sell land, admitted in an action of ejectment. *Halsey vs. Fanning*, 101

A writing which is denied, and no evidence of its being genuine, not allowed in evidence. *Thomas Niel vs. Miller*, 117

Evidence not admitted to prove a parol promise made more than three years before the action was commenced. *Ives vs. Beech* 125

If a specialty is lost, parol evidence is admitted to prove the loss, execution, and tenor of the instrument. *Kelly vs. Riggs*, 126

Parol orders of a judge of probate not allowed to be given in evidence. *Daniel Sherman, Esq. judge of probate vs. Ebenezer Talman, &c.* 140

Parol evidence admitted in an action of assumpsit for the use of land. *Eli Wells vs. Deming*, 149

Hearsay from the agent may be given in evidence against his principal. *Oliver Mather vs. James Phelps*, 150

Parol testimony admitted to prove

C O N T E N T S.

- a fraud in a written assignment of a note. *Ruffel vs. Tuttle*, 22
- Parol testimony not admitted to disprove a record. *Solomon Rogers vs. William Moore, executor of James Rogers*, 159
- Evidence to prove a forgery, not admissible, without producing the forged writing. *Simeon Smith vs. Holbrook, &c.* 45
- Duress or fraud may be given in evidence on the general issue. *Candy vs. Twichel*, 123
- A document on file, referred to by the record, may be given in evidence. *Oliver Wolcott, Esq. vs. Parmele*. 181
- A record between other parties cannot be given in evidence.
- A person may be a witness for the defendant to prove the truth of certain words, notwithstanding the plaintiff has sued him for speaking the same words. *Fowler vs. Collins*, 231
- A book of statutes, printed by a private printer, not admitted as evidence of the statutes of another state. *Boswick vs. Bogardus*, 250
- Same point, adjudged. *Canfield vs. Squire*, 300
- A deed which is denied not allowed to be given in evidence without proof of its execution. Depositions admitted to prove the loss, execution and tenor of a deed. *Canfield vs. Squire*, 300
- Evidence of a forgery not admitted, unless the instrument claimed to have been forged is produced. *Simeon Smith vs. Holbrook, &c.* 45
- In an action of trespass for breaking the plaintiff's house, terrifying his family and wounding his wife, evidence was not admitted as to the beating of the wife. *E. Lawrence vs. E. Phelps*, 334
- In an action on a promise to marry the plaintiff, the defendant was permitted to give evidence of the plaintiff's general character, as well as particular instances of unchastity, in his defence. *Dorcas Woodward vs. Bellamy*, 354
- An original entry in the defendants' books being withheld, a sworn copy admitted. *Sedgwick vs. David Waterman, &c. proprietors of the ore bed, &c.* 434

Executors.

- Not admitted to prove the sanity of the testator. *Hayden vs. O. Smith*, 350
- Liable for expenses incurred in the life time of the testator for the support of manumitted slaves. *Ebenezer Kingsbury vs. Tolland*, 355
- Must pay cost where they pursue actions without justice. *Executors of Selden Clark vs. Timothy Higgins*, 398
- Have no right to sue for lands, unless empowered by will, or it is wanted to pay debts. *Executors of G. Livingston vs. James Bird*, 438
- Being qualified in a foreign jurisdiction, does not enable them to join in suits here. *Joseph Perkins vs. Joseph Williams*, 462

CONTENTS.

Executions.

An execution in favor of a feme sole may be levied on land after her marriage and she choose an appraiser; an estate for 999 years taken by execution, must be appraised as land. *Perez Mun and wife vs. Carrington*, 15

A debtor taken by execution, may be permitted to go at large upon security to resign himself within the life of the execution. *Langdon vs. Chittington*, 152. 113.

An officer's return upon an execution levied on land, that it was appraised by A. B. and C. freeholders, &c. who were legally appointed and sworn by E. R. justice of peace, good. *Ebenzer Church vs. R. Russell*, 434

force, or the verdict will be had: on reversal no restitution of possession ordered. *Frederick Bull vs. Samuel Olcott*, 472

Foreign Attachment.

Goods in the hands of a fraudulent grantee liable to be taken and holden by a foreign attachment. *Christopher Starr vs. Tracy*, &c. 528

Fraud will defeat a title at law as well as in chancery. *Hill vs. Watts Hubbard*, 397

Shannon G. . . . 407.

Garnishee.

A garnishee cannot retain effects to discharge credits, given after he was copied. *P. Edwards vs. S. Baldwin*, 23

A garnishee who holds the effects of his absconding debtor in trust by a fraudulent conveyance, is liable to the creditors. *Pruden vs. William Leavensworth*, 129

In a scire facias it must be averred that the original defendant was an absconding debtor when the copy was left in service with him, and that he was so described in the original writ—and demand must be made of the garnishee within sixty days after the judgment. *Laight vs. Tomlinson*, 233

A garnishee allowed his expenses in defending his principal. *Barber vs. Andrews*, 250

F

False Imprisonment.

To apprehend a person and remand him to another state by warrant, on a prosecution for maintenance of a bastard child, not justifiable by law. *Burlingham vs. Wylee*, &c. 152

Forcible Entry and Detainer.

On a reversal of a judgment in a case of forcible entry, &c. the court will not award restitution of the possession. *Bird vs. Bird*, 411

In a prosecution for a forcible entry, &c. the jury must find the

C O N T E N T S.

Demand must be made of the garnishee within sixty days from the original judgment. *Wilford vs. Jones,* 324

Grants.

A grant to a person and the heirs of her body, &c. to have and to hold to her and her heirs forever, is a fee simple. *Chaffee, &c. heirs of Hannah Walker, vs. Dodge,* 205

Guardians.

In an action for taking away the plaintiff's ward, he must alledge the loss of service. The mother is natural guardian to the daughters, the father being dead, till they arrive of age to choose a guardian. *John Fields vs. William Law,* 320

Are liable on the covenants in an indenture of apprenticeship entered into with their consent. *Paddock vs. Higgins,* 316 & 482

Same point. *Hewitt vs. Morgan,* 363

Same point. *Clement vs. Miner,* 466

H

Habeas Corpus.

Not granted on application of the father to take a minor daughter from the mother. *William Nichols vs. Thomas Giles,* 280

Heirs.

Children of the same mother born out of wedlock are heirs to each other. *Samuel Brown vs. Dye,* 280

Hearsay.

Hearsay from old persons, respecting bounds, who were interested in the question, not admissible. *Daniel Porter, &c. vs. Warner,* 22

Hearsay from the agent of a party allowed to be testified. *Perkins, administrator, &c. vs. Samuel Burnet,* 30

Hearsay from the widow of the intestate to prove his insanity, to avoid a deed, not admitted. *Joseph P. Cook, Esq. vs. Lynn Osborn,* 31

Hearsay from the attorney who transacted the business may be given in evidence against his principal. *Oliver Mather vs. James Phelps,* 150

Highways.

Title to them not triable by a justice. *Bundy vs. Sabin,* 54
Forty years use, a prescription for a highway. *Candy vs. Lambert,* 173

Fifteen years possession a bar to the town's right. *Litchfield vs. Wilnot,* 288

C O N T E N T S.

I

Insolvent Estates.

Issue.

- Must be decided by the court or jury. *Kelly vs. Riggs*, 13
 Same point. *Ruffel vs. Cornwell*, 68
 If the issue joined is immaterial the court will give judgment according to the right of the cause upon the whole record. *Reynold Barber vs. Robert Gordon*, 95
 If substantial matter is plead in bar and the plaintiff takes issue on an immaterial point, and tho' the verdict is for the plaintiff, yet the court will give judgment for the defendant. *Basset vs. Gaius Davis*, 204
 If the issue is, whether certain matters concerning which the arbitrators made no award, were submitted or not, it is not an immaterial issue. *John Blackman vs. Peter Nichols*, 243
 Under the issue of non assumpsit in an action upon an express agreement, the defendant may not give in evidence any act of the plaintiff to excuse his non performance. *Deodat Bement vs. Miller Peck*, 494

Interest.

- Interest allowed on the consideration paid for land, in an action for breach of covenant. *Smith vs. Pitkin*, 46
 Interest given in an action of indebitatus assumpsit for money received. *Hofner vs. Barret*, 156
 Same point adjudged. *Shipman vs. Miller, &c.* 405

Claims of creditors against them barred by the disallowance of commissioners. *Cadwell vs. Smith, &c.* 187

- A creditor to an insolvent estate may not be a commissioner. *William Lyon vs. Benjamin Lyon*, 203
 Same point adjudged. *Rufus Fairbank's* appeal from probate, 386
 A creditor to an insolvent estate who has not exhibited his claim to the commissioners, if he would avail himself of the saving clause in the statute, must bring himself within it. *Abraham Nelson vs. Executor of Hendrick Winegar*, 421
 Creditors are concluded by the commissioners disallowing their claims. *Joseph Williams vs. Andrew Perkins, &c.* 470

Implied Warranty.

The law implies a warranty that the thing sold is what it is held out to be by the seller, and if not the seller must make it good, whether he knew it to be otherwise or not. *Joshua Bailey vs. Eliza Nichols*, 407

C

Indebitatus Assumpsit.

- Not supported by a special agreement. *Snow vs. Chapman*, 99
 Lies to recover money paid on a judgment which is set aside. *Hofner vs. Barret, administrator of Oliver Barret*, 156

C O N T E N T S.

- Lies to recover a legacy charged on land. *Warren, administrator of Sarah Moor vs. Rogers*, 156
- An implied promise is commensurate with the consideration out of which it arises. *Olmsfed vs. Doty*, 184
- Not supported by evidence of special circumstances out of the declaration. *Town of Hampton vs. Town of Windham*, 199
- It lies for money paid, where the consideration has failed. *Pettibone, administrator of Lemuel Roberts vs. James Roberts*, 258
- Will not lie, for money received by one of the partners, belonging to both, for which an account is to be taken. *Whitman vs. Wadsworth*, 267
- In an action for the rents and profits of land the defendant may shew the title to be in another. *City of New-London vs. Emerson*, 372
- Not to be expressed in terms of opinion only. *Knowles vs. State*, 282
- Mistakes in them to be corrected by writ of error or a new trial. *William Taylor vs. Ezra Starr*, 293
- Judgment on book not pleadable in bar of an action on bond. *Chapman vs. Brainard*, 375

Jurisdiction.

- If the value of the matter in dispute is uncertain the alledged value is the rule to determine the court's jurisdiction. *Pitkin vs. Flowers*, 42
- The jurisdiction of a justice extends not to try the title of a highway. *Ebenezer Bundy vs. Peter Sabin*, 54
- The courts of the state have jurisdiction of causes between a citizen of this state and a subject of Great Britain. *William Potter vs. Thomas Allen, &c.* 63
- A justice's jurisdiction in criminal causes not restricted to the town in which he dwells. *Andrew Kingsbury vs. Phips, &c.* 357
- A justice has no jurisdiction to decide upon a plea of title in an action of trespass, which is demurred to. *French vs. Potter*, 359
- If one of the plaintiff's, there being more than one, lives in the city, and the rest of the plaintiff's and the defendant lives out of the city, the city court has jurisdiction, 399
- A justice hath not jurisdiction to take a confession on a note for

Information.

- An information for a riot, is not barred by a conviction of a breach of the peace, before a justice for doing the same facts. *Hurd, Stanly, &c. vs. State*, 186

Insurance . . . 400.

J

Judgments.

- If a plea in abatement is ruled to be insufficient the judgment is, a respondeas ouster. *Enoch Thomas vs. Reuben Dorchester*, 124

C O N T E N T S.

£ 20, given as an escrow, to oblige the party to abide an award.

Nathaniel Talcott, jun. vs. S. and

J. Pulsifer, 443

The circuit court hath not jurisdiction of a cause brought by a citizen of this state, against a citizen of this state jointly with a citizen of another state. *Miller, &c. vs. Lynde,* 444

Jury.

The court will not take a cause from the jury because a party is not prepared in it. *Clinton vs. Hopkins,* 25

Same point. *Simeon Smith vs. Holbert, &c.* 45

L

Land.

Land sold for taxes and redeemed by a creditor within the year may be held as a mortgaged estate. *Bacon vs. Curtiss,* 39

Land given to a man and the heirs of his body is a fee tail. *Borden vs. Kingsbury,* 39

Legacy.

A bequest of one half of what a man's real estate shall be appraised at in money, is a gift of one half, without any deduction for payment of debts. *Spalding vs. Spalding,* 271

A lapsed legacy falls into the residuum. *Robert Crane, &c.*

heirs of Jesse Crane, appeal from probate, 487

Limitation.

A conditional claim against the estate of a deceased person must be exhibited within the time limited, or it will be barred.—*Painter vs. Eliza Smith, executor of Daniel Grant,* 142

A statute of limitation does not embrace causes of action which existed before it was made.—*Hull vs. Miner,* 223

A recognizance taken to the treasurer of the state, in a criminal prosecution, not within the statute of limitation. *A. Kingsbury, Esq. state treasurer vs. Moses Phips, &c.* 357

M

Marriages.

No minister has right to marry, unless ordained and settled in some place in this state. *George Roberts vs. State treasurer,* 381

Mariners.

An alteration of the voyage will excuse the mariners for leaving the vessel. *William Potter vs. Thomas Allen,* 63



CONTENTS.

Manumission.

A declaration of a mistress to her servant that he should be free at twenty-five years of age, judged to amount to a manumission at that age. *Geer vs. Huntington*,

364

A manumitted slave is settled in the town where his master belongs. *Town of Bolton vs. Town of Haddam*,

517

Masters of Vessels.

Have remedy against the bottom for outfits, &c. *Brooks vs. Williams*,

27

If they contract to go into a certain harbor if there is sufficient depth of water, they are to explore whether there is sufficiency of water or not. *Newton vs. Paddock*,

89

Have no right to sell their owner's property in the vessels they command. *Henshaw vs. Clark, &c.*

103

Militia.

A question as to what company a soldier belongs, is of military cognizance. *Daniel Loomis vs. Elijah Simons*,

454

Mortgages.

Chancery will not foreclose a second mortgagee, if he pays the debt for which the estate was

first mortgaged. *Cannon vs. Hallet, &c.*

29

An agreement in writing to reconvey land contained in an absolute deed, on payment of a sum of money, is a mortgage. *Samuel French, jun. vs. Zaccheus Lyon*,

69

A bona fide purchaser of a part of mortgaged premises will hold against creditors, or the assignees of the mortgagee, upon his paying his equitable part of the expense. *Israel Porter, &c. vs. Seabor and Shalor*,

146

If a defeazance was to have been given to a deed, and is evaded by the grantee, by fraud or otherwise, the court will consider it as given, and decree a redemption accordingly. *John Daniels vs. S. Alvoord, &c.*

196

Whenever it appears from the deed, or other writing under the hand of the grantee, that the deed was given as a security for money and not a sale, and to be given up or released on payment, chancery will consider and treat it as a mortgage. *Jonab Betton vs. John Avery*,

279

A mortgagor and his alienee are tenants at will at the option of the mortgagee. *Benjamin Judd, &c. vs. Woodruff*,

298

A mortgage of property as collateral security for the payment of a book debt, is a specialty which takes it out of the statute of limitation. *James Clark vs. B. Ball, administrator*,

329

A purchaser of a part of the mortgaged premises of the mortgagor may redeem the whole, paying the whole of the mortgage

C O N T E N T S.

money. <i>Amos Calkins vs. Mus- sch,</i>	333
Fifteen years possession will bar an equity of redemption unless there are circumstances which take it out of the rule. <i>Hopefill Cris- tington vs. Hezekiah Brainard,</i>	485
Same point. <i>Heirs of Daniel Shel- don vs. Seth Bird, &c.</i>	509

N

New Trials.

Granted on discovery of new evi- dence before judgment. <i>State vs. Lockier,</i>	84
Not granted on the jury's mistaking the law. <i>Scovel vs. Tyler,</i>	144
Granted in an action on a penal stat- ute where defendant's acquittal was obtained by false means. <i>Hilliard vs. Nubols,</i>	176
The granting of a new trial, by the general assembly, in a cause before the court of probate, not an ex post facto law. <i>John Cal- der, &c. vs. Caleb Bull, &c.</i>	350
Granted on a mistake in the coun- cil, as to the law, and to prevent inconsistency in decisions. <i>Par- mele vs. Lambert,</i>	430
A petition may abate in part only. <i>Whittlesey vs. Dickerson.</i>	317
Granted to the defendant on discov- ery of new evidence contained in a record laid in, but not read at the trial, by the plaintiff. <i>Gallup vs. Fitch,</i>	452

Newgate.

Imprisonment in Newgate a com- mon law punishment. <i>State vs. Daniel Wilson.</i>	62
---	----

Notes.

On a note to pay a sum in labor, the promisee must provide the la- bor, or the promisor will be excu- sed. <i>Barns vs. French.</i>	53
A joint and several note must be declared upon as such. <i>Brown & Wife vs. Pierce,</i>	95
A note given by a minor, and as- sented to after he is of full age is obligatory. Judgment reversed in the supreme court of errors. <i>Mary Alsop administratrix, vs. Michael Todd,</i>	105
If a note is expressed to be for a premium on a certain policy, on a hearing in damages, the court will notice the stipulation in the policy. <i>Lowet vs. Johnson,</i>	114
The promisor in an assigned note, upon notice of the assignment, must pay it to the assignee. <i>Sam- uel Ruffel vs. James Cornwell,</i>	122
A note that is lost must be declared upon with an averment of the loss. <i>Church vs. Flowers,</i>	144
A note to pay £60 in cattle by a day or £50 in money is a note for £50 money, if the cattle are not delivered. <i>Hux vs. Higby,</i>	190
Is not controlled by parol condi- tions. <i>Josiah Converse adminis- trator of Eleanor Converse vs. Stephen Moulton,</i>	193

C O N T E N T S.

The promisee may discharge a note tho' he is insolvent and the note is assigned. *Casby vs. Casby*, 269

A note given for a premium, on an insurance upon lottery tickets, not a void note. *Bacon vs. Goodfill*, 283

A note for land which the promisee gave a bond to convey, upon the notes being paid, is good. *Bacon vs. Pettibone*, 284

A blank endorsement on the back of a note will subject the endorser, in case it cannot be recovered by the endorsee's using due diligence when it falls due. *Abraham Bradley vs. Timothy Phelps*, 325

An endorsee of a note, executed in a state where it was negotiable, may sue it in his own name in this state. *Brown vs. Olcott*, 353

An individual or a company may authorize another to execute a note for them, and they will be bound by the signature that shall be made use of for that purpose. *Timothy Phelps vs. John B. Livingston*, 495

An endorsee of a note must use due diligence to recover the money and give notice of the non payment in a reasonable time. *E. W. Phelps vs. Asa Blood*, 518

An endorsee of a note, executed in Massachusetts may sue it in his own name here. *Goff vs. Billinghurst*, 527

Notary Public.

His attestation received as evidence without certificate of his appointment. *Spegail vs. Perkins, &c.* 274

Notice.

Where the thing to be done is equally the duty and equally in the power of the defendant to know as the plaintiff, special notice not necessary. *Spalding vs. Spalding*, 271

Nuisance.

A licence may be given in evidence in an action for a nuisance. *Dorance vs. Simons*, 208
To shut a man off from the road is a private nuisance. *Allyn vs. Lyon*, 213

O

Obligations.

On joint obligations the remedy at law survives against the surviving obligor. *C. Bulkly vs. Wright, &c. executors of Noah Bulkly*, 10

Upon joint and several obligations the obligee has remedy against either of the obligors or their executors. *C. Bulkly vs. Wright, &c.* 70

An obligation to pay for final settlement notes, what a third person shall estimate them at, does not become due until such estimate is made. *Baily vs. Tillinghast*, 97

The obligor on a bond must perform the condition if lawful and possible, or pay the penalty.—*Holdridge vs. P. Allen*, 139

C O N T E N T S.

Oyer.

Must be given of the records of this court if required. *J. Williams vs. J. Berry*, 462
 Not to be given of an instrument that is lost. *Paddock vs. Higgins*, 483
Obituary . . . 214.
 P

Payments.

Made in public securities, applied according to their value. *Thatcher vs. Prentice*, 20

Partition.

Not to be made of an estate in remainder after a life estate, which is not spent. *J. Culver vs. L. Culver*, 278

Parol Testimony.

Not admitted to explain a writing. *S. Bull vs. Talcott, &c. committee for building a court house*, 119
 In an action for the use and improvement of lands parol evidence is admissible. *E. Wells vs. Deming*, 149
 Parol testimony not admissible to contradict a record. *S. Rogers vs. W. Moor, executor, &c.* 159
 A party not compellable to join in a demurrer to parol testimony. *Hampton vs. Windham*, 199
 In an action for a prize drawn in a lottery, parol evidence admissible

to prove that the prize came out against the plaintiff's number. *N. Morgan vs. N. Minor, &c.* 220
 In an action for the rents and profits of land taken by execution, parol evidence not admissible to prove that the execution was paid. *Pitts vs. Clark*, 223
 Parol evidence admitted to disprove the certificate of a justice upon a deed, that the plaintiff acknowledged the same, by proving an alibi. *Dorothy Smith vs. John Ward*, 374
 Party not compellable to join in a demurrer to parol testimony. *Theodosius Fowler, &c. vs. Alexander Macomb*, 388
 Parol testimony admitted to prove that a witness was an atheist. *Beardsly vs. Foot & Son*, 399
 Parol evidence not admissible to prove a forfeiture, incurred by not giving a deed of land according to a parol agreement. *Benjamin Goodrich vs. Richard Pickels*, 498

Penalties.

Several penalties, incurred by an executor for not proving the will, may not be joined in one action. *Barber vs. Eno*, 150

Pledges.

Public securities pledged for a debt, cannot be called for till the debt is paid. *Hamlin vs. Mitchell*, 297

Policy of Insurance.

An abandonment by the assured,

C O N T E N T S.

necessary to a demand for a total loss. *Townsend vs. Phillips, &c.* 400

Pleas and Pleading.

Plea of title put in before the justice, may not be altered. *Riggs vs. Woodruff,* 35

On the plea of nul tiel record, fixpence variance is fatal. *Bescher vs. Sheriff Chester,* 90

A covenant never to demand, or to deliver up a note to the promisor, may be plead in bar. *Reynold Barber vs. Robert Gordon,* 95

The statute of frauds and perjuries must be plead in bar of an action for the debt of another. *Seymour vs. Mitchell,* 145

If to a plea in bar which avoids the note declared upon, the plaintiff replies and traverses an immaterial point, it will be bad on demurrer. *Lemuel Parish vs. Peter Stanton,* 154

It is not a departure in pleading for the plaintiff in his replication, to avoid the defendant's plea in bar, and fortify his declaration. *Theodosius Fowler vs. Alexander Macomb,* 388

A declaration of a judgment against A. Somers and David Goodrich, on a plea of nul tiel record, is not supported by a judgment against A. Somers and David Goodrich, jun. *Richard Dekentland vs. Asabel Somers,* 437

Promise.

A promise to pay a debt, in consideration of a discharge, is not cut off by the discharge. *Allen vs. Frijbie and wife,* 76

If a promise is to any person, who shall do a certain thing, the person who does the thing is entitled to the promise. *Samuel Bull vs. Talcott, Committee, &c.* 119

An express promise to pay a sum of money, is not discharged by the defendant's doing something else, unless by accord. *Mary Sidleman vs. Boardman,* 215

Records.

An averment contrary to a record not admissible. *Bush vs. Byvanks,* 248

Receipts.

Of clerks, evidence against their principal to the amount of what they receive only. *Dyer vs. Girard,* 55

A receipt denied and no evidence of it's having been executed, not allowed to go to the jury. *Thomas Neil vs. Miller,* 117

Rescues.

In an action for a rescue on mean process, the plaintiff must prove his debt. *Law vs. Atwater* 72

C O N T E N T S.

S

Selectmen.

Selectmen in binding out the children of paupers, cannot act in a double capacity; can bind none but paupers, with consent of the civil authority given at the time.

King vs. Brockway, 86

Selectmen liable in damages for an abuse of their power in appointing an overseer. *Sarah Waters vs. Selectmen,* 214

In an action in favor of a town for supporting a pauper, the selectmen admitted to prove the advancements. *Town of Salisbury vs. Town of Harwington,* 435

T

Town Clerk.

Having received a deed for record, may not deliver it up unrecorded. *Jacob Willet vs. Asa Hutchinson,* 85

Traverse.

A traverse taken to an immaterial point bad upon a demurrer. *Lemuel Pariss vs. Peter Stanton,* 154

An officer's return, unless traversed, will be taken to be true. *William Law vs. Hannah Hall,* 171

Schools and school Societies.

School societies composed of all denominations, are entitled to the school monies. *Cargel, &c. school committee vs. Grosvonor, &c.* 458

Sheriffs.

The penalty on sheriffs, &c. for not executing writs directed to them, extends to executions as well as writs on mean process. *Crocker vs. Waldo.* 251

In an action on a bond, that a prisoner shall abide faithful, if the sheriff is not liable to the creditor, he will recover only nominal damages. *Sheriff Lord vs. Benton, &c.* 335

Trespass.

If several are joined in an action of trespass, and plead severally not guilty, and one is wanted by the others for a witness, and the evidence is not sufficient to convict him, the court may direct a verdict to be found as to him separately. *Joshua Church vs. Dewolf, &c.* 282

A recovery in an action of trespass, is a bar to all trespasses of the same kind, prior to the date of the writ. *Fields vs. Law,* 320

Turnpike Roads.

Travellers on them liable for the toll, though they avoid the gate. *Abel Fitch vs. Turnpike Company,* 524

CONTENTS.

V

Vessels.

A creditor's attaching the share of a part owner does not affect the right of the other owners. *Nathaniel Williams vs. Lemuel Brooks,*

34

In a bill of sale of a vessel, the boat doth not pass as appurtenant to it. *Starr vs. Goodwin,*

71

Captains have no right to sell the property of their owners in the vessels they command, and evidence of such a general practice, not admissible. *Henshaw vs. Clark and Smith,*

103

An agreement to discharge a vessel in ten days after her arrival at a port, is to be computed from her having got into port to discharge her cargo. *Burton vs. Benjamin Butler,*

214

Owners of coasting vessels responsible for their sufficiency. *N. Scovel vs. Chapman, &c.*

315

Verdict.

The court will not set aside a verdict if substantial justice is done, unless by the rules of law they are obliged to. *Stephen Miller vs. Matthew Talcott, Esq. &c.*

115

A verdict must answer the whole of the issue. *Pettibone vs. Gozzard,*

254

A verdict on which judgment is rendered, may not be impeached but by error, or petition for a

new trial. *Thomas and Mary Taylor vs. Talman,*

291

A verdict set aside, because some of the jury conversed with the constable upon the case. *Bullock vs. Hosford, &c.*

349

In an action of account, a verdict which finds the defendant to be bailiff and receiver for a part of the time laid, is good. *Ball vs. Royce,*

451

W

Waste.

Action of waste doth not lie in favor of a remainder man against a stranger. *John Wilford vs. Rose,*

20

Warrants.

Warrants issued after the law is repealed for military delinquencies incurred before, are illegal. *Lambert. vs. Parmele, &c.*

181

Same point. *Joshua Church, &c. vs. Parmele, &c.*

248

Wills.

May not be proved by a legatee; may not be good and approved in part. *George Starr, &c. vs. Elibu Starr, &c. executors of Philip Mortimer's will,*

303

CONTENTS.

Witnesses.

- A witness may be interested in one point in a case and not in another. *Shelton vs. Tomlinson*, 132
- A witness introduced by plaintiff and not improved, and by the defendant called upon and testifies, may be impeached by the plaintiff. *Beebe vs. Tinker*, 160
- If a party attempts to prove a witness interested in the question, and fails, the court will not set him aside, though afterwards it appears he is interested. *William Coit, &c. vs. Bishop*, 222
- A person who has conveyed his land by deed to a purchaser, and afterwards, it is taken by a creditor by an execution, cannot be a witness to prove fraud either in the purchaser or creditor.—*Fowler vs. A. Norton*, 231
- A judge of probate may be a witness to a will. *Daniel Ford, appeal from probate*, 232
- Proprietors may be witnesses as to the title of lands which they have given a quit claim of. *Lay vs. Hayden, &c.* 317
- A witness must testify voluntary communications, though made confidentially. *Calkins vs. Lee*, 363
- A witness who is become interested voluntarily, is not excused from testifying what he knew before *Simons vs. Payne, &c.* 406

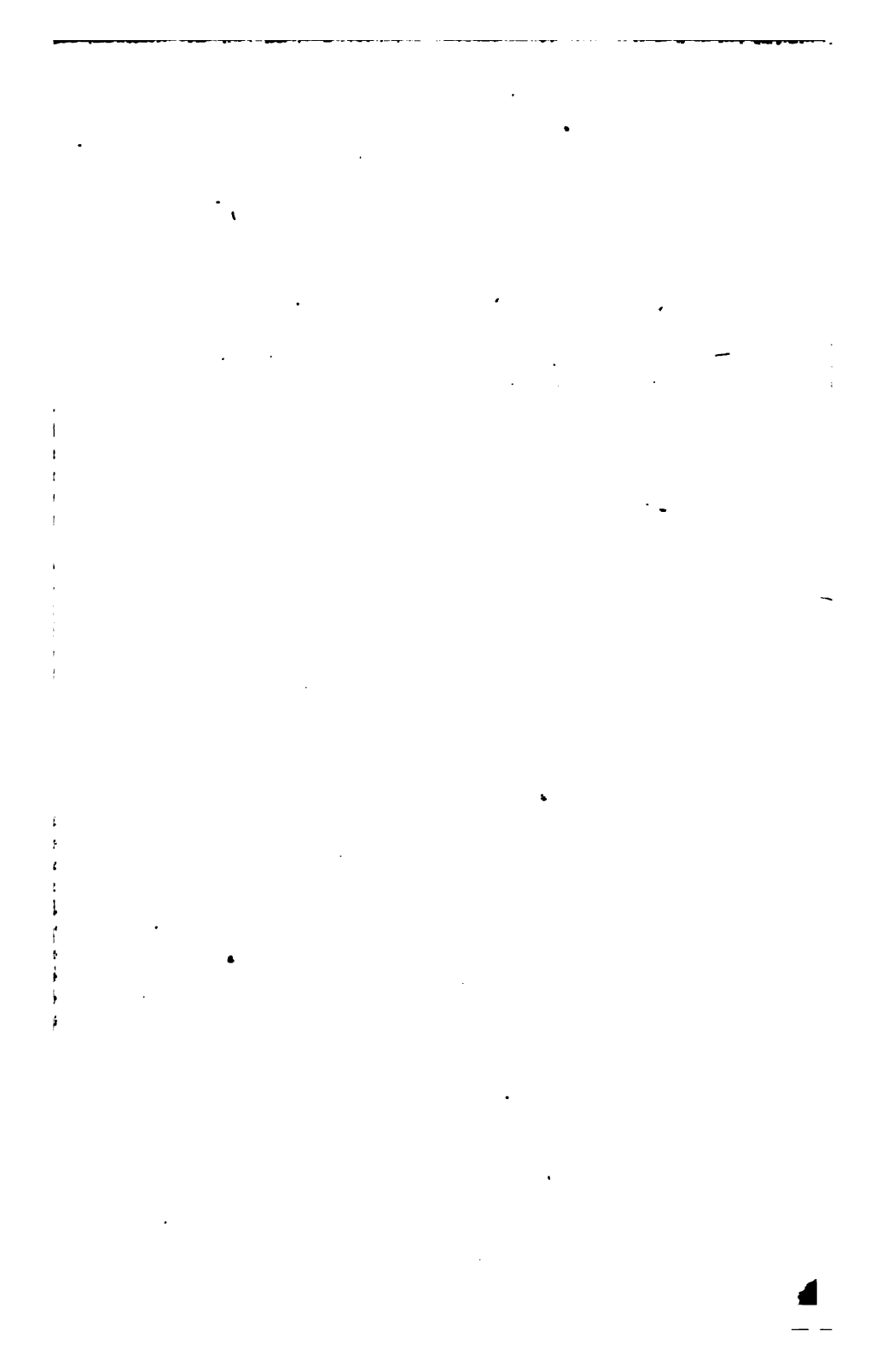
- In an action of trespass against several and one is acquitted; he may be a witness for the others in a petition for a new trial, notwithstanding the plaintiff has brought a petition against him. *Ramey, &c. vs. Joshua Church*, 420
- A partner in business with the defendant, not qualified as a witness for him, by his discharge. *Tomkins vs. Beers*, 498
- After the court have excluded the defendant's witnesses on the ground of a writing which the defendant withholds that would show their interest; they will not reconsider the question on his producing it. *Mitchelson vs. Enos*, 515
- A witness not compellable to testify against his interest. *Starr vs. Tracy, &c.* 528

U

Usury.

- A parol promise to pay more than lawful interest, for the forbearance of a just debt, made at the time of executing a note for the debt, will make the note void. *Atwood vs. Whittlesey*, 37
- Six per cent. interest in specie, reserved on a note taken for soldiers' notes, not usurious. *Hobart vs. Norton*, 46

Manwary 407. 6228

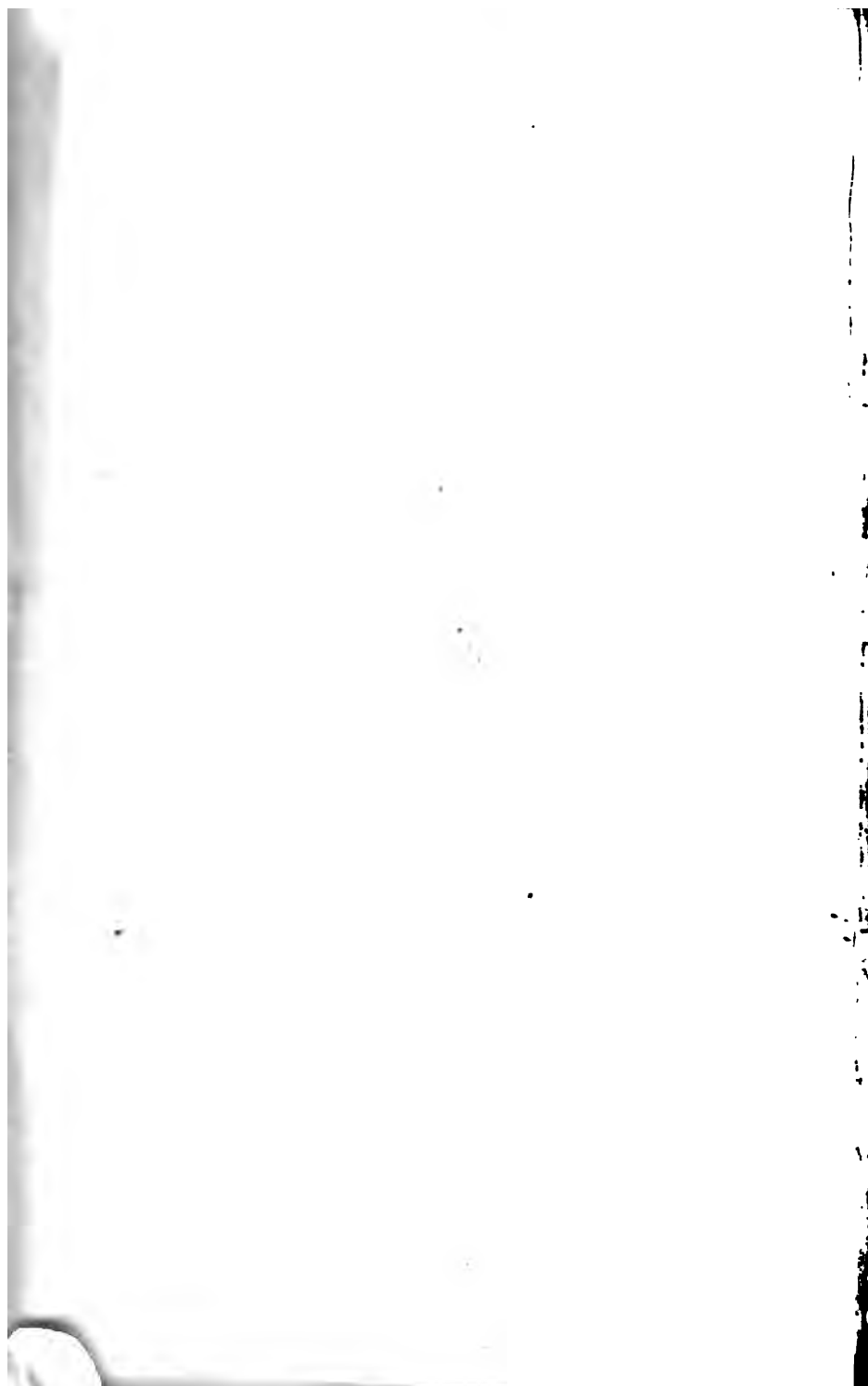


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